And ſo it is if the vill leaves a body, that died of a violent death, above ground unburied, the townſhip ſhall be amerced, 3 *E.* 3. *Coron.* 339. and the amercements in theſe caſes may be ſet upon the preſentment of the grand inqueſt, or upon the preſentment of the coroner.

But if a priſoner *in gaol* dies a natural death, yet regularly the gaoler ought to ſend for the coroner to inquire, becauſe it may be poſſibly preſumed, that the priſoner died by the ill uſage of the gaoler.

[58] And if this death happens in the king's bench, the clerk of the crown, who is the coroner for that court, is to view the body. 3 *E.* 3. *Coron.* 292. 8 *E.* 2. *Coron.* 421.

If the coroner have notice and comes not in convenient time to view the body and take his inquiſition upon the death of him, that thus dies ſuddenly, and therefore upon a preſentment by the grand inqueſt of a death by miſadventure, if the like preſentment be not found in the coroner's roll, he ſhall be fined and impriſoned. 3 *E.* 3. *Coron.* 292.

And by the ſtatute of 1 *H.* 8. *cap.* 7. he ſhall forfeit forty ſhillings for every ſuch default, and the juſtices of the peace and juſtices of aſſiſe have power to enquire of thoſe defaults, and this without any fee to be taken by the coroner. But by the ſtatute of 3 *H.* 7. *cap.* 1. if the coroner be remiſs, and makes not inquiſitions upon perſons ſlain, or doth not return the ſame to the next gaol-delivery, he is to forfeit 5l. for every default.

The coroner cannot take an inquiſition but upon the view of the body, and if he doth, ſuch inquiſition is void; and the reaſon is, becauſe oftentimes much of the evidence ariſeth upon the view, for the inquiſition ought to contain the manner of his death, the place, length and depth of the wound, &c.

And therefore tho where there are many coroners, one may take the inquiſition. *Stamf.* 53. *a*, yet it cannot be done by deputy, for by the ſtatute of *Exon* 14 *E.* 1. the coroner is to view the body and take the inquiſition in his own perſon. *Cxompt. Juſtice, f.* 227. *a.*

And therefore if the body be buried before the coroner comes, tho the coroner ought to record it, and the townſhip ſhall be thereupon amerced, as before is ſaid, yet the coroner ought to take up the body, and take his view thereof, if there be any poſſibility of it, and therefore the body hath in ſuch caſe been taken up fourteen days after,

and

and an inquiſition thereupon taken. 2 *R.* 3. 2. *a.* 21 *E.* 4. 70, 71. *Wingfield*'s caſe.

And therefore if the coroner take an inquiſition without view of the body, he may take a ſecond inquiſition *ſuper viſum corporis*, and that ſecond inquiſition is good for the firſt was abſolutely void. 2 *R.* 3. 2. 21 *E.* 4. 70. [59]

But if a coroner takes an inquiſition *ſuper viſum corporis*, and after this another coroner takes an inquiſition upon the ſame matter, the ſecond inquiſition is void, becauſe the firſt was well taken. *M.* 6 *R.* 2. *Coron.* 107. *Crompt. Juſtic.* 229. *b.*

If a coroner takes an inquiſition *ſuper viſum corporis* (as upon a *felo de ſe*), and that is ſent into the king's bench and quaſhed, the coroner may take a new inquiſition *ſuper viſum corporis*.

But upon a ſurmiſe, that the coroner ought to have found him *felo de ſe* and hath not, there ſhall be no *melius inquirendum* directed to the ſheriff; I have known it often denied, and it was held it was within the reſtraint of the ſtatute 28 *E.* 3. *cap.* 9.

But poſſibly a commiſſion or writ may iſſue for the inquiry of the goods of a felon not mentiond in the coroner's inquiſition.

If the coroner do not inquire of a *felo de ſe*, or of any other ſudden death, the juſtices of the peace or *oyer* and *terminer* may enquire thereof, and ſo may the juſtices of the king's bench, but then that preſentment is traverſable; but it is held that the preſentment of the coroner of a *felo de ſe* is not traverſable, *de quo ſupra, Part* I. *cap.* 31. *p.* 414. *Co. P. C. cap.* 8. *p.* 55.

When notice is given to the coroner of a miſadventure, he is to iſſue a precept to the conſtable of the four or ſix next townſhips to return a competent number of good and lawful men of their townſhips, *viz.* twelve at leaſt to make an inquiſition touching that matter. 4 *E.* 1. *Officium coronatoris.*

If they make not a return, or the jurors returned appear not, their defaults are to be returned by the coroner, and the conſtables or jurors in default ſhall be amerced before the juſtices in *eyre* antiently, but now before the juſtices of gaol-delivery.

But if the jurors appear, by *Crompt. Juſtice, f.* 226. *b.* they are not challengeable by either party.

Yet in *Mich.* 4 *Car. B. R.* Sir *William Withipole*'s caſe by the greater opinion of all the judges of *England* the ſtatute of 11 *H.* 2. *cap.* 9. extends to inquiſitions before the coroner, and [60]

that if in an inqueſt before the coroner one of the jurors be outlawed tho but of treſpaſs, this is a good plea to a coroner's inqueſt of murder *Cro. p.* 134.

The jury is to be ſworn and charged to inquire upon the view of the body how the party came by his death, whether by murder by any perſon, or by misfortune, or as *felo de ſe*.

In ſuch caſes, where the coroner's inqueſt is concluſive, (as it is commonly held in the caſe of *felo de ſe,*) the coroner muſt hear evidence as well againſt the king's intereſt as for it, and that upon oath, for there is no perſon to be condemned to death, but only the fact to be inquired into.

And ſo it was ruled in *Barclaie*'s caſe who drowned himſelf, and the coroner would not admit witneſſes to prove him to be *non compos mentis* at the time, but ſhut them out, and only took witneſſes for the king; and for this cauſe the coroner was reprehended by the court of king's bench, and the inquiſition ſet aſide and not ſuffered to be filed, and a new inquiſition taken, whereby it was found he was *non compos*, for in this caſe there was no perſon put to anſwer; *de hoc vide ſupra, Part* I. *p.* 415.

But it hath been held, that if a perſon be killed by another perſon, and it be certainly known that he killed him, the jury muſt hear evidence only for the king; and whether the killing were by malice or without malice, nay tho it were ſuch a killing as is juſtifiable, as an officer killing one that aſſaults him in doing his office, yet the inqueſt muſt find it murder, becauſe the party ſhall be put to anſwer, and upon not guilty pleaded the whole matter will come to be tried by the petit jury, where the evidence of both ſides may be openly heard in court, and ſuch direction given as the nature of the fact requires, *viz.* to be murder, manſlaughter, or *per infortunium*: and thus it hath been commonly practiſed of later years.

But it ſeemeth to me, that this is neither reaſonable nor agreeable [61] to law or antient uſage, but is a novelty as to the caſe of the coroner's inqueſt, tho it may be and is reaſonable and fit in caſe of an indictment by the grand inqueſt of the county, for theſe reaſons: 1. Becauſe the coroner's inqueſt, is to inquire *truly (e) quomodo ad mortem devenit*, and is rather for information of the

(e) Why ſhould not this argument hold as well in the caſe of an indictment by the grand inqueſt, ſince they are likewiſe by their oath *to preſent the truth, the whole truth, and nothing but the truth? vide infra, p.* 157.

truth

truth of the fact as near as the jury can aſſert it, and not for an accuſation. 2. Becauſe tho the priſoner may be arraigned upon the coroner's inqueſt, if it find it murder or manſlaughter, yet neither the court nor the proſecutor is concluded by it, but a bill of murder may be preferred to the grand inqueſt; and upon that new preſentment the party may be arraigned and tried, tho the coroner's inqueſt ariſes only to manſlaughter, or it may be to *ſe defendendo* or chance-medley. 3. And accordingly the antient practice hath been, for the coroner's inqueſt to find the matter as they judge it was: *vide* 26 *Eliz. Crompt. Juſtice, f.* 28. *a. Holmes*'s caſe, *Coke's Entries* 353. *b.* and very often in the antient *Iters* of *E.* 2. and *E.* 3. *de quo ſupra.*

And therefore the difference of the penning of the act of 1 & 2 *P. & M. cap.* 13. touching the examinations taken by the juſtices of the peace and the coroner is obſervable: The juſtices of the peace are to put into writing the informations againſt the felon of the fact and circumſtances thereof, or *ſo much thereof as ſhall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without ſaying *ſo much as is material to prove the felony*, but the whole evidence given whether to prove or diſprove the felony; and all this evidence is to be upon oath before the coroner's inqueſt, whether it makes for or againſt the priſoner: but indeed when the priſoner is to be tried upon that indictment, or the indictment of the grand inqueſt, thoſe witneſſes, that acquit the priſoner, are not to be heard upon oath at his trial, unleſs the proſecutor deſires it *(f)*.

So that I do conceive the coroner's inqueſt ought in all caſes to hear the evidence upon oath, as well that which maketh for, as that which maketh againſt the priſoner, and the whole evidence ought to be returned with the inquiſition. [62]

Now ſudden violent deaths, which are all within the coroner's office to inquire, are of theſe kinds. 1. *Ex viſitatione Dei.* 3. *Per infortunium*, where no other had a hand in it, as if a man falls from a houſe or cart. 3. By his own hand, as *felo de ſe.* 4. By the hand of another man, where the offender is not known 5. By the hand of another, where he is known, whether by murder, manſlaughter, *ſe defendendo*, or *per infortunium.*

(f) This was indeed the practice, tho unſupported by any authority in law; but now by 1 *Ann. cap.* 9. the witneſſes on the behalf of the priſoner in all trials for treaſon or felony are to give evidence upon oath.

1. If the inqueſt find that he died *ex viſitatione Dei*, there is no more to be done, only the inquiſition, together with the examinations, are to be returned to the next gaol-delivery, by the ſtatute of 3 *H.* 7. *cap.* 1.

2. If the inqueſt find the death *per infortunium* ſimply, as by a fall *&c.* then the coroner is to take the examination, and return the ſame with the inquiſition to the next gaol-delivery, and to inquire of the deodand, and the value, and in whoſe hands, and to ſeize and deliver the ſame to the townſhip to be anſwerable for the ſame to the king, by the ſtatute of 4 *E.* 1. *De officio coronatoris.*

But if the perſon were drowned in a pit, the coroner ſhall command the vill to ſtop it, and if it be not done, the vill ſhall be amerced in *eyre*, or before juſtices of gaol-delivery. 8 *E.* 2. *Coron.* 416.

And *note*, that in no caſe the coroner ſets any fine or amercement as for non-appearance of juries or conſtables, eſcapes of townſhips, *&c.* but only preſents it to the next juſtices in *eyre*, or now to the next gaol-delivery, and they impoſe the fine.

3. If the inqueſt find a man *felo de ſe*, they ought to find the ſpecial matter, and alſo what goods and chattels he had, of what value, and ſeize and deliver the ſame to the townſhip to be anſwerable to the king or his almoner, or the lord of the franchiſe, to whom they belong, and ſhall bind over the firſt finder of the body to the next gaol-delivery.

[63] 4. If the party be ſlain and the felon is not known, they are to find their inquiſition accordingly, and ſhall bind over the firſt finder of the body to the next gaol-delivery, and return his examinations, together with his inquiſition, by the ſtatute of 1 *&* 2 *P. & M. cap.* 13.

And *note*, that the antient manner of inquiry in this caſe, whether by the coroner or juſtices in *eyre*, was, 1. *Quis primus inventor?* 2. *An malè creditur?* If ſo, then if he were preſent, he might be arraigned; if abſent, they went on to the outlawry againſt him; but if they anſwered, *non malè creditur*, then he was diſcharged. 35 *H.* 6. 15. *a. B. Conſpiracy* 4.

5. But if the perſon was ſlain, and the party that did it was known, and the inquiſition found him guilty of the death, or that he died by his hand, there were theſe proceedings, namely,

The inqueſt were alſo to inquire of all that were preſent, aiding and abetting.

They

They ſhall alſo inquire of all acceſſaries *before* the fact, but they cannot inquire of acceſſaries *after* (*), and therefore a preſentment of a *fugam fecit* upon an acceſſary *after* is void. *Stamf. P. C.* 183, 184. 4 *H.* 7. 18. *b.*

If they find a man guilty as principal or as acceſſary *before*, they are alſo to inquire whether he fled for the ſame; for if the party be acquit upon his trial, nay tho the petit jury upon his trial find him not guilty, nor that he fled, yet this inquiſition before the coroner ſhall cauſe a forfeiture of his goods, for it is not traverſable. *Dy.* 238. *b. Stamf. P. C. p.* 183. *b.* (†).

If a party be found guilty by the coroner's inqueſt, or that he fled, they are alſo to inquire of his goods and chattels; and by the antient law the coroner was preſently thereupon to ſeize and inventory his goods, and delivery them to the *villata* to be anſwerable to the king for them, as appears by the ſtatute of 4 *E.* 1. how far this is alterd by the ſtatute of 1 *R.* 3. *cap.* 3. *vide quæ ſupra, Part* I. *cap.* 27. *p.* 365.

But it ſeems, that if there be a preſentment before the coroner of a *fugam fecit*, the ſtatute of 1 *R.* 3. takes no place as to that, becauſe, whether convict or acquit, the *fugam fecit* ſtands as [64] an unavoidable forfeiture, and therefore the coroner may without queſtion ſeize the goods ſo found by inquiſition upon a *fugam fecit*, and commit them to the townſhip.

If the perſons, that are found guilty by the inqueſt, be taken, the coroner may and muſt commit them to the ſheriff, and he is to ſend them to the gaol by the ſtatute of 4 *E.* 1. But if any were preſent and found not guilty, the coroner was to bind them over to the next gaol-delivery by the ſame ſtatute, and to record their names in his roll: This was to the intent, that if farther evidence was diſcovered againſt them, they might be there proceeded againſt, if not, then they might be uſed as witneſſes; but the ſtatute of 1 & 2 *P.* & *M. cap.* 13. hath made better proviſion; *de quo infra.*

If the parties found guilty as principals or acceſſaries *before* by the coroner's inqueſt be not to be found, the coroner might proceed to the outlawry againſt them at common law; *quod vide* 27 *Aſſiz.* 47. *viz.* by proceſs of *capias* to the ſheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed: *vide Crompt. Juſtice, p.* 226. *b.*

(*) *Vide Part* I. *p.* 416. *in notis.* (†) *Vide Part* I. *p.* 363 & *p.* 417.

But now that courſe is alterd, and the coroner ought not to proceed to the outlawry, but is to return his inquiſition to the next gaol-delivery by the ſtatute of 3 *H.* 7. *cap.* 1. and the juſtices of gaol-delivery are to proceed againſt the offenders, if in gaol; and if not in gaol, then to certify the inquiſition into the king's bench, and there proceſs of outlawry to go againſt them upon that inquiſition.

And by the ſtatute of 1 & 2 *P.* & *M.* *cap.* 13. the coroner is to take the examinations againſt the principals and acceſſaries *before*, and put them in writing, and bind over witneſſes by recognizance to the next gaol delivery, and then to return their examinations, recognizances, and inquiſitions upon pain of 40*s.* for every default.

In caſe of an indictment of murder or manſlaughter by the grand inqueſt, if the priſoner appears, pleads, and be acquitted by the petit jury, they ſay ſo and no more, only they inquire of the flight.

[65] But if a perſon be found guilty by the coroner's inqueſt, and plead and be acquitted, yet in as much as the coroner's inqueſt have found that he was kild, the court gives credit to it, and therefore the petit jury muſt alſo give in, who it was that kild him, which ſerves as an indictment againſt that other perſon. 13 *E.* 4. 3. *b.* 14 *H.* 7. 2. *b.* and commonly if they cannot tell, they give in ſome fictitious name as *John a-Noke*, which ſerves the turn.

If there be an inquiſition of manſlaughter or murder, and alſo an indictment by the grand inqueſt of the ſame offenſe, and he is arraigned and found not guilty upon the indictment by the grand inqueſt, yet it is neceſſary to quaſh the other inquiſition or arraign the party upon it, and he is to plead *auterfoits acquit*, or *not guilty*, and ſo be acquit upon that alſo, for it otherwiſe ſtands as a record againſt him, upon which he may poſſibly be outlawed.

But if both indictments be of the ſame nature and for the ſame offenſe and be good, he may be arraigned and tried upon both at once.

By the ſtatute of *Weſtm.* 1. *cap.* 10. the coroner was to take nothing for the execution of his office touching the death of a man.

But by the ſtatute of 3 *H.* 7. *cap.* 1. in caſes of murder or manſlaughter he was to have the fee of 13*s.* 4*d.* out of the goods of the felon, or out of the amercement ſet upon the townſhip for an eſcape.

But by the ſtatute of 1 *H.* 8. *cap.* 7. for an inquiſition upon the death of a man by ſimple misfortune or miſadventure, he is to take nothing upon pain of forfeiting forty ſhillings.

1. By

1. By what hath been before ſaid it appears, that the coroner hath power to take an inquiſition of felony of the death of a man, and likewiſe of certain incidents thereunto. 1. Of acceſſaries before the fact, but not of acceſſaries after. 2. Of the eſcape of the manſlayer, that thereupon the townſhip may be amerced, which is farther confirmed by the ſtatute of 3 *H.* 7. *cap.* 1. 3. Of his flight. 4. Of his goods and chattels: But he hath no power to take an inquiſition of any other felony, tho in ſome caſes he hath power to take appeals of other matters, as ſhall be ſaid hereafter. 2 *Co.* [66] *Inſtit. p.* 32. Only by cuſtom in *Northumberland* the coroner hath power to inquire of other felonies. 35 *H.* 6. 27. *b.*

But it is ſaid that he may take the confeſſion of him, that breaks priſon, and upon his record thereof the party ſhall be hanged. 8 *E* 2. *Coron.* 435.

2. But altho he hath power to take an inquiſition touching the death of a man, it muſt be *ſuper viſum corporis*, and not otherwiſe.

And therefore in antient times if a man were hurt in the county of *A.* and died in the county of *B.* the coroner of the county of *B.* could not take an inquiſition of his death, becauſe the ſtroke was not given in that county, nor could the coroner of the county of *A.* take an inquiſition, becauſe the body was in the county of *B.* but they uſed to remove the body into the county of *A.* and there the coroner of that county to take the inquiſition. 6 *H.* 7. 10. *a.*

But this would not avail, till the ſtatute of 2 & 3 *E.* 6. *cap.* 24. gave a remedy in this caſe by indicting and trying him in the county where he died.

But if he were ſtricken and had alſo died in the county of *A.* and the body had by ſome means been after removed into another county, he ought to be removed into the county of *A.* where he was ſtricken and died.

3. That altho he might take an indictment of death, and at common law proceed to outlawry, yet by the ſtatute of *Magna Carta*, *cap.* 17. he was diſabled to hear or determine *that* felony, or to make execution upon the outlawry.

4. But tho the coroner could not take any inquiſition but *ſuper viſum corporis*, yet in ſome caſes, that were not felony, he might take an inquiſition; as 1. *De Theſauro invento.* 2. Of wreck and royal fiſh. 3. And it ſeems he had a power to attach a perſon, that had dan-

dangerouſly wounded another, and that not only upon an appeal of mayhem, but alſo *ex officio*, as a thing tending to danger of death; *quod vide* 4 *E.* 1. *De officio coronatoris.*

[67] And thus far touching inquiſitions before the coroner.

II. The ſecond thing, wherein the coroner's power lies, is taking of appeals, namely appeals of murder, appeals of robbery, appeals of rape, appeals *de plagis & mahemio*; and this appears by the ſtatute of 4 *E.* 1. *De coronatoribus.*

Theſe appeals can be taken only of facts done within the county, whereof he is coroner. *Stamf. P. C. f.* 63. *a. (g).*

This appeal is to be by bill in proper perſon, and before the coroner and ſheriff: *vide ſtat.* 34 *H.* 7. *cap.* 1.

But yet the coroner is the principal judge, and therefore a *certiorari* to remove ſuch a bill may be to the coroner alone. 4 *H.* 6. 16. *a. Dy.* 222. *b.* or to the coroner and ſheriff, becauſe by the ſtatute of *Weſtm.* 1. *cap.* 10. the ſheriff hath a counter-roll. 38 *E.* 3. 14. *b. Regiſter* 284. *a. Dy.* 223. *a.* But not to the ſheriff alone neither for appeals nor outlawries, unleſs in *London. Dy.* 317. *a.*

Altho by the ſtatute of *Magna Charta, cap.* 17. the coroner cannot determine the appeal, yet he may do theſe things. 1. He may record the nonſuit of the plaintiff in an appeal by bill before him, 22 *Aſſiz.* 93. 2. He may award a *capias* and *aliàs* to the ſheriff, and may thereupon demand the defendant at five counties, and outlaw the defendant, 22 *Aſſiz.* 97. tho *Stamford* makes a doubt of it, *Lib.* II. *cap.* 14. *f.* 64. *a.* and thinks that the appeal muſt be removed by *certiorari* into the king's bench, and there only proceſs of outlawry can iſſue; but when the appeal is ſued before the coroner and ſheriff, to have the appeal determind it muſt be removed into the king's bench by *certiorari.*

III. The third power of the coroner is to take the accuſation of an approver, namely when a perſon is indicted before juſtices of gaol-delivery or in the king's bench for any felony, he may confeſs the offenſe, and impeach or accuſe or appeal others of felony, and thereupon the court aſſigns him a coroner to take his confeſſion.

The coroner upon an appeal by an approver may take an appeal of
[68] the approver againſt any perſon for any felony or treaſon committed in the ſame county, or in any other county. 19 *E.* 3. 42. *Coron.* 462.

(g) & 52. *b.*

If

If the appeal be in the ſame county, it ſeems the coroner may make a precept to the ſheriff to take the perſon appeald; but if he be only a coroner of a franchiſe, it ſeems he may make a precept to the ſheriff to attach him, *quære*; but howſoever he cannot make a precept to the bailiff of the franchiſe, becauſe the bailiff of a franchiſe cannot execute a proceſs within his franchiſe, but by the precept of the ſheriff. 29 *E.* 3. 42. *Coron.* 462.

And therefore it ſeems in that-caſe he muſt return the appeal before the judge of gaol-delivery within the franchiſe, and he may make proceſs within the franchiſe to the ſheriff; *vide* the caſe of *Ely*, 29 *E.* 3. 41. *b. quære*, how the uſage is there, *viz.* whether the judge makes proceſs out of the liberty, and to whom.

But if the appeal be of a felony or treaſon out of the county, the ſame muſt be removed or certified to the juſtices of gaol-delivery, and they may make proceſs into any county of *England* to take the perſon appeald; and ſo the caſe of an appeal by an approver differs from the appeal by a perſon grieved. 5 *H.* 5. *Coron.* 437. 29 *E.* 3. 42. *Coron.* 462. *Stamf. P. C. Lib.* I. *cap.* 52. *f.* 53.

IV. The fourth power of the coroner is to take the confeſſion of a felony by a felon, tho the felony were committed in any foreign county, and to take his abjuration. *Stamf. f.* 53.

But by the ſtatute of 1 *Jac. cap.* 25. continued by 21 *Jac. cap.* 28. the whole buſineſs of ſanctuary, and the abjuration before the coroner relative to ſanctuary, is taken away; and therefore it is needleſs to repeat the office or power of the coroner in relation to ſanctuary *Co. P. C. cap.* 51.

See 1 Blackſ. Com. ch. 9. pa. 346. 4 Blackſ. Com. ch. 19. pa. 274. ch. 21. p. 292. Index to 2 Hawk. p. C. Tit. Coroner and Burn. Tit. Coroner.

CHAP. IX. [69]

Concerning the ſheriff, *his power in pleas of the crown, as well by commiſſion, as in his* Turns.

THE power of the ſheriff to hold pleas of the crown, as well as the coroners and other the king's bailiffs, is reſtrained and taken away by *Magna Charta, cap.* 17. recited in the former chapter.

Yet

Yet after that ſtatute he had power to receive indictments and preſentments of felony, tho he had not power to determine them.

And this power was of two kinds, *viz.* ſpecial by virtue of a ſpecial writ or commiſſion, and general or *virtute officii* in his *Turn*.

The former of theſe powers, *virtute brevis* or *commiſſionis*, continued in uſe till the ſtatute of 28 *E.* 3. *cap.* 9. and by that ſtatute all former commiſſions and writs of that nature are repeald; and enacted, that for the future no ſuch commiſſion or commiſſions ſhall be granted.

And therefore *H.* 37 *Eliz. B. R.* where the coroner found a death *per infortunium*, and it was ſurmiſed for the king, that he was *felo de ſe*, and a *melius inquirendum* prayed to the ſheriff; ruled that none ſhould iſſue, becauſe contrary to the ſtatute.

The latter power of the ſheriff is *virtute officii*, and this ſtill continues in the ſheriff, namely, that he hath power in his *Turn* to take inquiſitions of felonies, that were felonies at common law; but the ſheriff cannot take any inquiſition of any felony created by act of parliament, unleſs the ſame act likewiſe gives him juriſdiction; and therefore the ſheriff in his *Turn* cannot take an inquiſition of rape.

[70] This court is a court of record, and the ſheriff or his ſteward or clerk is judge in it, the ſtyle *Placita coram vicecomite com'* S. *in Turno*.

The indictments taken here have theſe requiſites.

1. That the courts be held *infra menſem Paſchæ, & menſem Michaelis* by the ſtatute of 31 *E.* 3. *cap.* 15. or elſe they loſe their turn for that time, which hath been expounded their court ſo held for that turn only ſhall be void. *Stamf. P. C. f.* 84. *b.* 6 *H.* 7. 2. *a.* 38 *H.* 6. 7. *a.*

2. The indictment muſt be under the ſeals of the indictors, and by twelve jurors at leaſt by the ſtatute of *Weſtm.* 2. *cap.* 13. *(a)*. And by the ſtatute of 1 *E.* 3. *cap.* 17. it muſt be by rolls indented between the ſheriff and the indictors, (which laſt ſtatute extends alſo to leets and franchiſes,) otherwiſe the indictments are void; and one of the indictors muſt ſhew one part of the indenture to the juſtices, when they come to make deliverance.

3. By the ſtatute of 1 *R.* 3. *cap.* 4. the indictors in the ſheriff's *Turn* muſt have 20*s.* freehold, or 26*s.* 8*d.* copyhold, and be of good name, otherwiſe the ſheriff or bailiff ſhall forfeit 40*s.* and the indictment is void.

(a) 2 *Co. Inſtit. p.* 337.

And

And therefore, if any be arraigned of felony upon ſuch an indictment, he may plead that one of the indictors had not 20*s.* freehold, nor 26*s.* 8*d.* copyhold; ſo that when it is ſaid *it ſhall be void*, it muſt be intended void by plea; for if the priſoner excepts not to it upon his arraignment, he is concluded by that omiſſion.

Upon theſe indictments of felonies in the ſheriff's *Turn*, tho they could not proceed to hear and determine them by reaſon of the ſtatute of *Magna Charta*, *cap.* 17. yet the ſheriff did commonly make out proceſs or precepts in nature of *capias* to arreſt the parties, as appears by the ſtatute of *Weſtm.* 2. *cap.* 13.

But now by the ſtatute of 1 *E.* 4. *cap.* 2. their power of making out proceſs upon theſe indictments is taken away, as well in caſe of indictments of felony, as other miſdemeanors within their cognizance; but they are to deliver all ſuch preſentments and indictments to the juſtices of the peace at their next ſeſſions, who are [71] to make out proceſs thereupon, and hear and determine them; but if the original preſentment were not within the juriſdiction of the *Turn*, the juſtices of peace ought not to proceed upon ſuch indictments, tho removed before them. 4 *E.* 4. 31. *a.* 8 *E.* 4. 5. *b.*

And what hath been ſaid touching the *Turns* of ſheriffs is in a great meaſure applicable to leets, namely they have power to receive indictments of felonies at common law, but not of felonies by act of parliament, unleſs ſpecially limited to them.

The ſtatutes of *Magna Charta*, *cap.* 17. 1 *E.* 3. *cap.* 17. extend to them as well as to *Turns*, but not the ſtatute of 1 *E.* 4. and therefore they cannot hear and determine felonies preſented in them, but muſt ſend their indictments of felonies to the juſtices of gaol-delivery there to be heard and determined, if the offenders are in cuſtody, 8 *H.* 4. 18. *a.* *Franchiſe* 2. or remove by *certiorari* into the king's bench, that proceſs may be made upon them to an outlawry.

And thus far concerning the ordinary juriſdiction, wherein felonies are inquired of, heard or determined; I have wholly omitted the courts in *eyre*, the courts of the *ſtaple*, and the franchiſe of *infangthief* and *unfangthief*, becauſe they are wholly diſuſed, and the learning concerning them rather for curioſity and antiquity, than for uſe in this buſineſs of pleas of the crown. The juriſdiction alſo of the royal franchiſes of *Ely*, *Hexham* and *Hexhamſhire*, and other particular franchiſes remaining excepted by the ſtatute of 27 *H.* 8.

cap.

cap. 24. are but particular juriſdictions, and not ſo uſeful for the pleas of the crown, as for a tract concerning the juriſdiction of courts.

And thus far touching the ordinary juriſdictions in caſes capital.

See 1 Blackſ. Com. ch. Introd. p. 116. ch. 9. 339. 4 Blackſ. Com. ch. 21. pa. 292. ch. 33. p. 413. 428. ch. 19. p. 273. and Burn. Tit. Sheriff. per tot. and Index to 2 Hawk. P. C. Tit. Sheriff. Tit. Turn.

---

[72] CHAP. X.

Concerning the apprehending *or* arreſting *of felons and traitors by* private perſons, *and* eſcapes.

HAVING in the foregoing chapters conſidered the ſeveral courts of ordinary juriſdiction, where traitors and felons are to be proceeded againſt, I ſhall now deſcend to the conſideration of the means and method of bringing ſuch offenders to trial, judgment, and execution.

And herein I ſhall obſerve this order, firſt to conſider thoſe courſes, that are preliminary to their arraignment, and afterwards to conſider of their arraignment, and thoſe proceedings, that are ſubſequent thereunto, their trial, judgment, and execution.

Concerning the former, namely the courſes preliminary to their arraignment, they are principally theſe, *viz.* 1. The arreſt or apprehending of them. 2. Their impriſonment or commitment, and therein of bailing or diſcharging them before indictment. 3. Their indictment.

Touching the firſt of theſe, namely their arreſts or apprehending them.

This is the firſt inſtance of their proſecution, and this is done either, 1. By private perſons by virtue of the law, or 2. By officers or *virtute officii*, or 3. Upon hue and cry levied, or 4. By warrant or precept *virtute præcepti*.

But before I come to theſe I will conſider ſomething concerning eſcapes of felons, and what puniſhment lies upon *them* that permit it, which will open the conſideration of what is every perſon's duty in this caſe; and by this eſcape I do not mean eſcapes ſuffered by ſheriffs

riffs or gaolers, but eſcapes ſuffered by vills, townſhips, or private perſons.

If there be a murder or manſlaughter committed either in the day or night in an incloſed town, if the murderer be not [73] taken, the town or city ſhall be amerced upon a preſentment thereof, either by the coroners or grand inqueſt before the juſtices of gaol-delivery. 3 *E.* 3. *Coron.* 299. But if it were a vill not incloſed; there if a murder were committed within the precinct of the vill, tho in the field, and the murderer not taken, if it were done in the night, the vill ſhould not be amerced; but if it were in day-light, tho in the evening, the town ſhould be amerced. 3 *H.* 7. *cap.* 1. 3 *E.* 3. *Coron.* 293.

And the ſame law is if the killing were by a man by miſadventure, if he eſcapes and be not taken. 3 *E.* 3. *Coron.* 302. for tho by the ſtatute of *Marlebr. cap.* 26. that common fine or amercement called *murdrum* (*) was not to be impoſed in caſes of death *per infortunium*, yet the amercement called *eſcapium* took place even in that caſe. *Vide Bracton, Lib.* III. *cap.* 15.

If the malefactor were taken by the townſhip, and delivered to the ſheriff or his bailiff, or to the gaoler of the county, and then an eſcape happen, the townſhip is not chargeable, but the ſheriff or bailiff. 3 *E.* 3. *Coron.* 337.

But if he be in guard of the conſtable, and the conſtable is bringing him to the gaol, yea tho the gaoler refuſed to take him, if he eſcapes, it is a charge upon the vill. 3 *E.* 3. *Coron.* 346. 10 *H.* 4. 7. *a. Eſcape* 8. *per Gaſcoigne*; nay, tho in the flight he be ſlain for neceſſity of retaking him becauſe he reſiſts, yet it is an eſcape upon the vill. 3 *E.* 3. *Coron.* 328.

And in caſe the vill be not ſufficient to anſwer the amercement, the hundred ſhall be charged therewith, and in default of the hundred, the county; and if the killing be out of any vill, the hundred is amerceable for the eſcape. 8 *E.* 2. *Coron.* 425. *Stamf. P. C. Lib.* I. *cap.* 31. *f.* 34. *b.*

But this is only in caſe of felony touching the death of a man, for there the fact is apparent, that the man is ſlain; but in caſe of other felony, as theft, there tho the thief be not taken, no amerce-mercement lies upon the town, nor other penalty at common [74] law, but by the ſtatute of *Winton, de quo infra.*

(*) *Vide Part* I. *p.* 35. 425. 447.

But

But if they had a felon in their cuſtody, or in the cuſtody of the conſtable, and he eſcape, the vill had been amerceable, and ſo is the hundred, if they have him in their cuſtody, or in the cuſtody of the conſtable of the hundred, and ſuffer him to eſcape. 3 *E.* 3. *Coron.* 316.

The law uſed in the time of *H.* 3. when *Bracton* wrote, appears *Lib.* III. *cap.* 10. to be thus: if a man had committed manſlaughter either by misfortune or otherwiſe, if he fled, and the jury were inquired of by the judge if he were *in decennâ*, then the *decenna* was to be amerced by the court, becauſe they had him not there; if he were not in any *decenna*, then the vill was to be amerced; becauſe they received him an inhabitant, and had him not *in franco plegio*; for every one above twelve years old ought to be in frank-pledge, except clergymen, noblemen, and knights and their families (*): and therefore in the caſe of clergymen, noblemen and knights, if any of their family *de manupaſtu* committed a murder or manſlaughter, the clergyman, nobleman or knight was amerced if the malefactor fled, unleſs ſome ſpecial cuſtom had abrogated it, as in *Hertfordſhire*: and thus did the practice long after continue: *vide* 8 *E.* 2. *Coron.* 428. *Si ſerviens alicujus domini in ſervitio ſuo exiſtens facit feloniam & convincatur, quamvis poſt feloniam ipſius non receptavit, amerciandus eſt*; and 3 *E.* 3. *Itin. North'ton, Coron.* 203. It was preſented, that *A.* had *killed B.* and it was demanded of the preſenters, whether he were *in decennâ?* They anſwered, *He was not?* Then it was demanded where he abode? They ſay with the parſon of the town; and thereupon the parſon was amerced for his *manupaſt*. Then it was demanded who was preſent when he ſlew him? They ſay *C.* It was then demanded of them, whether *C.* received him [took him]? They ſay *Not*; wherefore *C.* was amerced. Then it was demanded where the felon was? They ſay *he is eſcaped*; then it was demanded whether it were done in the day or the night? They anſwer *in the evening*; therefore the whole vill was amerced.

[75] Several things are obſervable in this caſe. 1. That if he had been *in decennâ*, the *decenna* had been amerced, becauſe they had not him preſent *ad ſtandum rectο in curiâ*. 2. That becauſe the parſon nor his family were not by law to come to the view of frank-pledge, he was amerced for one that was of his family, one *de manupaſtu*. 3. That he that was preſent and took not the offender,

(*) *Vide Part* I. *p.* 65. *in notis.*

was

was alſo amerced. 4. That becauſe the felony was committed in the day-time, and the felon eſcaped, the whole vill was amerced, 22 *E.* 3. *Coron.* 238. ſo in effect three amercements for one eſcape.

And *note*, that according to *Bracton*, *ubi ſupra*, he is *de manupaſtu*, *qui eſt ad victum & veſtitum*, or *ad victum cum mercede*, as a houſhold ſervant; and according to the antient law, he that entertained a man three nights, made him to be *de manupaſtu*.

This law of amercing the *decenna*, or him of whoſe family an offender is, is not abrogated, but yet it is not now uſed; but it was certainly a moſt excellent conſtitution, whereby every man was under the pledge of his maſter or father, with whom he lived, or muſt be within ſome *decenna* that may ſee him forthcoming: *vide Spelman in Gloſſar. Titul.* Friburg & *Leges Edvardi*, *cap.* 19. 20. *(a)*.

As thus the vill is anſwerable for an eſcape, ſo is he that is preſent when a manſlaughter or murder is committed, and doth not do his beſt endeavour to apprehend the malefactor, though he were not party or acceſſary to the crime; with this agrees 8 *E.* 2. *Coron.* 428. beforementioned, where it is called only an amercement; but 8 *E* 2. *Coron.* 395. he that was of full age, that was preſent when a manſlaughter was committed, *et ne leva le maine d' attach le felon*, was committed to priſon, till he made fine to the king, but he that was within age was diſcharged *(b)*.

And tho in the book of 14 *H.* 7. 31. *b* a perſon indicted for being preſent at a felony, without ſaying he was aiding and abetting, was diſcharged, it was becauſe the indictment there was with intent to make him a felon, and not to charge him with a miſdemeanor for not purſuing the felon: *vide Co. P. C. p.* 117. It is a miſdemeanor, for which the party ſhall be fined and impriſoned. [76]

By that which hath been ſaid, it appears, that the apprehending of a felon is in many caſes a duty, and not arbitrary, even in caſes of a private perſon, without any other warrant than what the law gives, and that the omiſſion thereof is a miſdemeanor, and puniſhable by fine or amercement.

And now therefore I come to conſider touching the arreſts by a private perſon in caſe of felony.

And this is of theſe kinds. 1. Where the party arreſted hath really committed a felony, and this is known to the party arreſting. 2. Where the party arreſted hath really committed a felony, but it is only

(a) Wilk. Leg. Anglo-Sax. p. 201. *(b) Vide Part* I. *p.* 21.

ſuſpected, and not certainly known to the party arreſting. 3. Where there hath been a felony committed, and the party arreſting doth, upon probable grounds, ſuſpect the perſon arreſted to have committed it, tho in truth he did it not.

I. As to the firſt of theſe, where a perſon hath committed felony, and *A.* knows it.

It is true in this caſe, if the time and nature of the fact, and the condition of things will bear it, it is beſt to complain to a juſtice of peace, and have his warrant for the apprehending of him; or if that cannot be had in convenient time, then to call to his aſſiſtance the conſtable; but ſuch the caſe may be, that the delay that muſt ariſe neceſſarily by theſe ſolemnities, may give the felon opportunity to eſcape; and therefore in this caſe *A.* without any other authority than what the law gives him, may arreſt or apprehend the felon; and if he cannot do it by his own ſtrength, he may call others to his aſſiſtance, or raiſe hue and cry for his apprehenſion; and if he doth not thus, he is puniſhable, as is above declared, if it can appear that he knew it.

And it will be all one, whether the felony were committed in the ſame county, or in any other county; for the law in this caſe makes *A.* an officer; and this was antiently the law, and ſtill is. *Bracton Lib. ult. in fine, in criminalibus cauſis, ubi ſequi debet capitale ſupplicium, vita videlicet vel mutilatio membrorum, non ſequitur attachiamentum aliquod, ſed corpus talis, quicunque ille fuerit, ab omnibus arreſtetur, qui ſunt ad fidem domini regis, ſive inde præcegtum habuerit, ſivè non habuerit*; and accordingly it is ruled, 19 *E.* 4. 17. *b.* that it is a good juſtification for a man in an action of falſe impriſonment to ſay, that the plaintiff committed a felony, and ſhew what, and the defendant arreſted him, and delivered him to the conſtable, or he might have brought him to gaol by himſelf or his ſervant, as is there agreed.

[77]

But the ſafer way is, to bring him before a juſtice of peace, who may examine and commit him.

And as a private man may do thus upon a felony committed, ſo if he ſee danger of murder by a dangerous wound given, he may purſue the offender. 7 *E.* 3. 16. *Barre* 291.

And in both theſe caſes, he may break open doors, if he be denied entrance, and if *de facto* the felon or malefactor be there, for the law makes him an officer in this caſe, as well as if he were a juſtice of peace or conſtable. 7 *E.* 3. 16. *b.*

Nay

Nay yet farther, if the felon reſiſts or flies, ſo that he cannot be taken without killing him, this is juſtifiable, and no felony; but ſtill it muſt be where he cannot be otherwiſe taken, for it is for advancement of juſtice, and ſuppreſſion of felons, and therefore if they cannot be otherwiſe apprehended, it is lawful, as well as if *A.* were a conſtable, or had a warrant; and if the books that ſpeak of this matter, be but carefully examined, it will appear that the law was ſo generally taken, tho he were purſued or taken without any formal proceſs to the ſheriff, and that as well before an arreſt made, as after; and this appears *in terminis*, 22 *Aſſiz.* 55. 3 *E.* 3. *Coron.* 346, & 328, & 290. but indeed the books of 3 *E.* 3. *Coron.* 288, 289. are of a conſtable and watchman: but in 3 *E.* 3. *Coron.* 349. the townſmen that did it were fined 40*s.* but it ſeems it was more for the eſcape than the killing: *vide Stamf. P. C. Lib.* I. *cap.* 6. *f.* 13. *a. b. accordant.*

As to the ſtatutes of *Magna Charta*, *cap.* 29. 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. 42 *E.* 3. *cap.* 3. they do not at all concern this preparatory impriſonment of a felon, as ſhall be ſhewn in due time; and therefore whatſoever hath been before ſaid holds true in [78] the firſt inſtance of his impriſonment, tho the party be not yet indicted.

II. As to the ſecond caſe, *viz.* where a felony is committed by *B.* but *A.* that arreſts him, doth not certainly know it, as not being preſent at the committing of it.

I take the law to be all one with the former caſe, only what he doth herein, he doth at his peril; for if in truth *B.* be a felon, then *A.* may arreſt him, and may break a houſe to arreſt him, if he be within the houſe, and refuſes to render himſelf; yea, and if he will not ſuffer himſelf to be taken, he may in caſe of neceſſity be killed; but this ſtill is at the peril of *A.* for if he be no felon, it may be manſlaughter at leaſt in *A.* if he doth it.

But how far forth this will be juſtifiable in caſe that *A.* hath a good cauſe of ſuſpicion, will be conſiderable in the next enquiries.

III. The third caſe is, there is a felony committed, but whether committed by *B.* or not, *non conſtat*, and therefore we will ſuppoſe, that in truth it were not committed by *B.* but by ſome perſon elſe, yet *A.* hath probable cauſes to ſuſpect *B.* to be the felon, and accordingly doth arreſt him; this arreſt is lawful and juſtifiable, and the reaſon is, becauſe if a perſon ſhould be puniſhed by an action of treſpaſs, or falſe impriſonment for an arreſt of a man for felony under theſe cir-

cumſtances, maleſactors would eſcape to the common detriment of the people.

But to make good ſuch a juſtification of impriſonment, 1. There muſt be in fact a felony committed by ſome perſon; for were there no felony, there can be ground of ſuſpicion. Again, 2. The party, (if a private perſon), that arreſts, muſt ſuſpect *B.* to be the felon. 3. He muſt have reaſonable cauſes of ſuch ſuſpicion, and theſe muſt be alledged and proved.

1. There muſt be a felony done; and therefore if a man be taken for ſuſpicion of felony, and delivered to the conſtable, or remains in the cuſtody of him that took him, yet if in truth no felony were committed, he may be let go at large, and no puniſhment ſhall enſue for
[79] the eſcape. *Kelw.* 34. *a. b.* But if a felony were committed, though he that is taken for the ſuſpicion thereof be in truth innocent, and it ſo appears to the conſtable, or him that arreſts him; yet if he let him go before he be indicted, and acquitted or delivered by proclamation before the juſtices of gaol-delivery, the party letting him go ſhall be puniſhed for an eſcape. 44 *Aſſiz.* 12. *Poulton de Pace, f.* 146. *b.* 5 *H.* 7. 4. 7 *H.* 4. 35. *a.*

2. The party that arreſts him, muſt be he that ſuſpects him, and regularly it cannot be done by another; and therefore if a man juſtifies in falſe impriſonment for ſuſpicion, he muſt juſtify it as his own act, and not by the command of the ſheriff or other officer, nor can another juſtify by the command of him that ſo ſuſpects. 11 *E.* 4. 4. *b.*

But this doth not always hold true; for an officer of juſtice, may, in aſſiſtance of him that ſuſpects, juſtify the impriſonment; as a conſtable, upon a complaint made to him by him that ſuſpects, may juſtify; but he muſt allege his juſtification in the ſame manner as he that ſuſpected ought, *viz.* a felony done and cauſe of ſuſpicion; and therefore the party ſuſpecting and deſiring the conſtable's aſſiſtance muſt acquaint him with the whole matter, and the cauſes of his ſuſpicion, otherwiſe he is not bound to aſſiſt him. 2 *H.* 7. 15. *b.* And in like manner a juſtice of peace being applied to by him that ſuſpects and acquainted with the whole circumſtances of the caſe (*).

And this appears beyond diſpute even by the ſtatute of 34 *E.* 3. *cap.* 1. whereby power is given to the juſtices of peace to arreſt all thoſe whom they find by indictment or by ſuſpicion, and to put them in priſon.

(*) *Vide Part* I. *p.* 580.

And

And the reaſon is apparent, namely, the juſtices of peace are made judges of the reaſonableneſs of the ſuſpicion, and when they have examined the party accuſing touching the reaſons of their ſuſpicion, if they find the cauſes of ſuſpicion to be reaſonable, it is now become the juſtice's ſuſpicion as well as theirs, and accordingly adjudged, *P.* 43 *Eliz. C. B. Croke, n.* 35. *Tatam*'s caſe *(c)*, and therefore the ſaying of my lord *Coke*, 4 *Inſtit. p.* 177. "That notwithſtanding ſuch "warrant, or the aid of the conſtable upon ſuch complaint, [80] "it is ſtill the party's arreſt, and not the conſtable's or juſ- "tice's, and that he muſt be preſent, and that he cannot break open a "door by virtue of ſuch warrant," is neither warranted by the law nor the common practice (*); and in the book of 2 *H.* 7. 15. *b.* where one juſtified in aid of the conſtable upon a felony done, and a ſuſpicion and cauſe thereof, *ut infra*, it was ruled a good juſtification againſt the opinion of *Bryan*; and it is apparent by the ſtatute of 5 *E.* 3. *cap.* 14. "If any perſon hath any evil ſuſpicion of perſons to be "robberds-men, waſters or draw-latches, they ſhall be incontinently "arreſted by the conſtables of the town, be it by day or night; and if "they be arreſted within franchiſes, they ſhall be delivered to the "bailiff of the franchiſe; if in the gildable, to the ſheriff, and kept in "priſon till the coming of the juſtices."

The ſuſpicion may be by any perſon, yet the impriſonment muſt be by the conſtable; and the reaſon is that which is given before, becauſe the conſtable is a proper officer, to whom complaints of this nature may be made.

And therefore if a felony be committed upon the goods of *A.* and the goods be found in the cuſtody of *B.* and *A.* comes to a conſtable and ſhews him the caſe, and requires him to bring him before a juſtice; this is a good juſtification by *A.* in falſe impriſonment brought againſt him without ſo much as an averment, that he ſuſpected him. *H.* 4. *Car. Rot.* 513. *Marbery* and *Porter*, *B. R. vide* 2 *E.* 4. 8. *b.*

But it is true, that he that is not an officer cannot juſtify by the command of him that ſuſpects, if he alſo be no officer; and ſo are the books of 5 *H.* 7. 5. *a. per Cur'.* 12 *Co. Rep.* 92. Sir *Antony Aſhley*'s caſe, 11 *E.* 4. 4. *b.*

But then the caſe is eaſily ſolved, for if a felony be committed, and *A.* hath probable cauſe to ſuſpect *B.* and accordingly ſuſpects *B.* and acquaints *C.* with the whole matter, *C.* upon this having probable

(c) *Cro. Eliz. p.* 829. (*) *Vide Part.* I. *p.* 579.

cauſe to ſuſpect *B.* tho he cannot juſtify the impriſonment of *B.* *as by the command of A.* that firſt ſuſpected him, he may juſtify *by his own ſuſpicion*; and the like of him that comes in aid of *A.* to arreſt *B.* 5 *H.* 7. 4 & 5.

[81] 3. The third thing to be obſerved in this arreſt by a private perſon upon ſuſpicion is, that he hath a probable cauſe of ſuſpicion.

And theſe probable cauſes are very many, as for inſtance common fame, 5 *H.* 7. 4. *b.* 2 *H.* 7. 15. *b.* 11 *E.* 4. 4. *b.* &c. hue and cry levied, 21 *H.* 7. 28. hath part of the goods found upon him, or be indicted of the like, 12 *Co. Rep.* 92. *Aſhley's* caſe, party with him that committed the robbery. 7 *E.* 4. 20. *a.*

And *note*, that the law hath that care, that malefactors, tho but ſuſpected, ſhould be apprehended, that a man may alledge twenty cauſes of ſuſpicion, and it ſhall not make his plea double, for one anſwer makes an iſſue upon the whole, *viz. de injuriâ ſuâ propriâ abſque tali cauſâ*, and no iſſue ſhall be ſingly taken upon one cauſe of ſuſpicion, where many cauſes are thus alledged. 2 *E.* 4. 8 & 9. 7 *E.* 4. 20. *a.*

Now what is to be done by a private perſon, that thus arreſts a party upon ſuſpicion of felony; if after ſuch an arreſt the party arreſting diſcharge him without bringing him to a juſtice or conſtable, he ſhall be puniſhed for the eſcape at the king's ſuit, but it makes not the impriſonment unlawful as to the party. 10 *E.* 4. 17. *b.*

Or he may carry him to the gaol, and if the gaoler receive him, he that made the arreſt is diſcharged, 10 *E.* 4. 18. *a.* but he muſt not carry him to a gaol of any other county than where he is taken, unleſs either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 *E.* 4. 4.

Or he may deliver him to the conſtable of the vill, and that is a ſufficient diſcharge, 10 *E.* 4. 17, *b.*

But the proper way is to bring him to a juſtice of peace, who may commit, or diſcharge, or bail him, as the caſe requires.

Yet if the party ſo arreſted be ſick and cannot be removed without danger of death, he may detain him in his own houſe, till he can reaſonably bring him to a juſtice or officer, 2 *E.* 4. 8. *b.*

[82] The arreſt of a man upon ſuſpicion of felony by a private perſon is, as before is ſaid, a thing permitted by law and therefore juſtifiable; but it is not a thing commanded by law, neither

is

is the party puniſhable, if he omit it, as in caſe where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's ſuſpicion but himſelf (*).

And therefore there is not the ſame privilege in all points allowed to him that arreſts upon ſuſpicion, as to him that arreſts upon hue and cry, or by warrant, or where he is preſent at the felony committed, and ſo knows it.

1. It ſeems he that arreſts as a private man barely upon ſuſpicion of felony, cannot juſtify the breaking open of doors to arreſt the party ſuſpected, but he doth it at his peril, *viz.* if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable, 4 *Co. Inſtit. p.* 177, 178. (but yet to prevent a murder or manſlaughter a private perſon may break open a door, 12 *H.* 8. 2. *b.*) but he may enter by the doors open, and make the arreſt in the houſe.

But *note*, that in all arreſts he muſt acquaint the party with the cauſe of his arreſt.

But in caſe of a known felony done by the party, or where a felony is done, and a conſtable comes and demands entrance upon a complaint to him, or by a juſtice of peace's warrant, or upon hue and cry; there the doors may be broken open upon notice and demand of entrance and refuſal.

2. Again, if there be a felony committed by *B.* and *A.* is preſent and ſees it, and purſues the felon, and he cannot be otherwiſe taken, and *A.* kills him in the purſuit, tho he have not arreſted him, the law juſtifies him; and poſſibly the ſame law may be in caſe of an officer, a warrant, or hue and cry, tho the perſon be not guilty of the fact, if he refuſes to ſubmit to the arreſt; but *de hoc infra.*

But if a felony be committed, and *A.* upon probable cauſe ſuſpects *B.* to have been the felon, tho the law permits him to arreſt *B.* tho in truth innocent, yet he cannot juſtify the killing of him upon his flight and refuſing to ſubmit, *juſticiari ſe permittere nolens*; but if he kills him, it is at his peril; for if *B.* be innocent, it is at leaſt manſlaughter, *Co. P. C. p.* 56. 221. 22 *Aſſiz.* 55. and the reaſon is, becauſe *B.* is not bound to take notice of *A.* as authorized to arreſt him, as being no officer, nor having any warrant; it is true, a conſtable arreſting in the king's name, or offering ſo to do, the party is [83]

(*) *Vide Part* I. *p.* 490.

bound to take notice and ſubmit, as hath been ſaid, *Part* I. *cap.* 37. but a mere ſtranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for poſſibly he may think he came to rob him.

3. Yet farther, if an innocent perſon be actually arreſted upon ſuſpicion by a private perſon, all circumſtances being duly obſerved, and he breaks away from the arreſt, yet I do not think the perſon arreſting can kill him, tho he cannot be otherwiſe taken, for the perſon arreſted is not bound to take notice of that authority that the law gives to a private perſon in this caſe.

But then can he juſtify the beating or ſtriking of him in caſe he cannot otherwiſe take him that thus makes the aſſault? As where a bailiff of the ſheriff by warrant arreſteth a perſon, tho he cannot ſtrike or beat him before the arreſt to take him; yet after the arreſt and eſcape ſuch bailiff may juſtify his beating, if he cannot otherwiſe retake him according to the opinion of the book, 2 *E.* 4. 6. *b.*

And it ſeems he cannot, but only lay his hands gently upon him to lay hold of him for the reaſon before given.

4. But then ſuppoſe that either before the arreſt or after the arreſt, *B.* draws his ſword and aſſaults *A.* and *A.* preſſeth upon him either to take or detain him, and in the conflict *B.* kills *A.* is it murder in *B.* or if *A.* kills *B.* is it juſtifiable and no felony in *A*?

If the bailiff of a ſheriff is about to take a priſoner, and before he takes him the party draws his ſword and kills him, this is murder, as is before ſaid, *Part* I. *cap.* 37. And on the other ſide, if either after or before the arreſt the bailiff upon aſſault made upon him kills the party, this is no felony, neither is he bound to give back to the wall. *Co. P. C. p.* 56 & 221.

[84]

It ſeems, that if the party arreſted kills him that thus arreſts upon ſuſpicion, always ſuppoſed the party killing is innocent,) this is but manſlaughter and not murder; and on the other ſide, if the party arreſting kills the party arreſted or intended to be arreſted by him upon ſuſpicion, that this is manſlaughter; and tho the arreſt in this caſe had been lawful, yet the party arreſting hath not the ſame privilege, as in caſe of killing a man upon hue and cry, tho the party arreſted after the arreſt, or upon the attempt of the arreſt, aſſaulted him that arreſted him or attempted to arreſt him. 1. Becauſe in this caſe, tho the law impowers the party to arreſt him, yet it is but a power of permiſſion, not an injunction by the law, neither is he puniſhable if he had

had not made ſuch an arreſt; and ſo not like the caſe of an arreſt by an officer, warrant of a juſtice, hue and cry, where it is a duty to arreſt, and the party, that omits his duty in this caſe, is puniſhable by fine and impriſonment for his omiſſion. 2. Becauſe he might have had a legal warrant from a juſtice of peace, or called an officer to his aſſiſtance, and then he had been under a more effectual protection of the law in what he did in purſuance of his duty. 3. It would give too great a latitude for perſons to be their own judges in this caſe, and to take away a man's life who is innocent, and poſſibly might not have ſufficient aſſurance, that either a felony had been committed, or that he that arreſts had a juſt or lawful cauſe of ſuſpicion.

And it ſeems the law is the ſame, whatſoever the cauſe of ſuſpicion were, yea altho the perſon were indicted for the offence, becauſe a perſon innocent may be indicted, and becauſe there is another way to bring him into an anſwer, namely proceſs of *capias* to the ſheriff, who is a known reſponſible officer. 3 *E.*. 3. *Coron.* 346.

And thus far concerning arreſting by a private perſon upon ſuſpicion.

See Burn. Tit. Arreſt per tot. & Index to 2 Hawk. P. C. tit. Arreſt. Foſter. 136. 319. 320. and 4 Blacks. Com. ch. 21. of Arreſts. pa. 289, &c.

CHAP. XI. [85]

Concerning arreſts *or* apprehenſion of felons, *or perſons* ſuſpected of felony *by an* officer.

THERE are certain officers and miniſters of public juſtice, that *virtute officii* are empowered by law to arreſt felons, or thoſe that are ſuſpected of felony, and that before conviction, and alſo before indictment.

And theſe are under a greater protection of the law in execution of this part of their office upon theſe two accounts. 1. Becauſe they are perſons more eminently truſted by the law, as in many other acts incident to their office, ſo in this. 2. Becauſe they are by law puniſhable, if they neglect their duty in it.

And therefore it is all the reaſon that can be, that they ſhould have the greateſt protection and encouragement in the due execution of their

their office, ſince their actings herein are not arbitrary but neceſſary duties, (not permiſſions,) and under ſevere puniſhments in their neglect thereof.

And hence it is, that theſe officers, that are thus intruſted, may without any other warrant but from themſelves arreſt felons, and thoſe that are probably ſuſpected of felonies; and if they be aſſaulted and killed in the execution of their office, it is murder; and, on the other ſide, if perſons that are purſued by theſe officers for felony or the juſt ſuſpicion thereof, nay for breach of the peace or juſt ſuſpicion thereof, as night-walkers, perſons unduly armed, ſhall not yield themſelves to theſe officers, but ſhall either reſiſt or fly before they are apprehended, or being apprehended ſhall reſcue themſelves and reſiſt or fly ſo that they cannot be otherwiſe apprehended, and are upon neceſſity ſlain therein, becauſe they cannot be otherwiſe taken, it is no felony
[86] in theſe officers or their aſſiſtants, that upon inevitable neceſſity kill them, tho poſſibly the parties killed are innocent, for by their reſiſtance againſt the authority of the king in his officers, they draw their own blood upon themſelves.

The officers that I herein principally intend are, 1. Juſtices of the peace. 2. Sheriffs. 3. Coroners. 4. Conſtables. 5. Watchmen. And when I mention theſe I alſo include all, that come in their aid and aſſiſtance; for every man in ſuch caſes is bound to be aiding and aſſiſting to theſe officers upon their charge and ſummons, in preſerving the peace and apprehending of malefactors, eſpecially felons.

And if any being thereunto called ſhall not give their aſſiſtance, they are to be puniſhed by fine and impriſonment, and conſequently are under the common protection of the law equally with the officers themſelves.

And that was the reaſon of the ſtatutes of 7 *Jac. cap.* 5 and 21 *Jac. cap.* 12. that gave power as well to aſſiſtants of the moſt uſual peace-officers, as to the officers themſelves, to plead the general iſſue, and give the ſpecial matter of their juſtification in evidence, and allow double coſts to the defendant.

Whereſoever a private perſon may arreſt a felon or perſon ſuſpected, there any of theſe officers may do it; but of this ſufficient hath been ſaid before: I therefore come to that power, that concerns them ſpecially as officers in this caſe.

I. *Juſtices*

I. *Juſtices of peace* have a double power as in relation to arreſt of felons; one upon complaint of another perſon, whereof hereafter, *cap.* 13. Another primitive and original in themſelves, whereof at preſent.

If a juſtice of peace ſee a felony, or other breach of the peace, committed in his preſence, he may in his own perſon apprehend the felon.

And ſo he may by word command any perſon to apprehend him, and ſuch command is a good warrant without writing; but if the felony or other breach of the peace be done in his abſence, then he muſt iſſue his warrant in writing under his ſeal to apprehend the malefactor, 14 *H.* 7. 9. *b.* adjudged; and by *Fineux*, if there be any riot or breach of the peace like to happen by a tumultuous meeting, *&c.* he may command his ſervants or others to prevent it by arreſting the parties. [87]

And *note*, that if the juſtice of peace hath either from himſelf or by a credible information from others knowledge of a felony done, and juſt cauſe of ſuſpicion of any perſon, he may himſelf arreſt and commit that perſon, 14 *H.* 7. 8. *per Keble*; and according to it are the expreſs words of the ſtatute of 34 *E.* 3. *cap.* 1. beforementiond.

II. Secondly, As to the *ſheriff*, it is ordaind by the ſtatute of *Weſtminſt.* 1. *cap.* 9. *(a)*, "That all generally be ready and appointed at the commandment and ſummons of the ſheriff, and at the cry of the country to ſue and arreſt felons, when any need ſhall be, as well within franchiſes as without, and they that will not ſo do, nnd thereof be attaint, ſhall make grievous fine to the king, and if default be found in the lord of the franchiſe, the king ſhall take the franchiſe to himſelf, *&c.* And if the ſheriff, coroner, or bailiff, will not attach or arreſt ſuch felons there, as they may, or will not do their office for favour borne, to ſuch miſdoers, and be attaint, they ſhall have a year's impriſonment and after make grievous fine, if they have wherewith, and if not three years impriſonment.

By this ſtatute the ſheriff is not only enabled but injoind to arreſt felons, and all perſons are required to be aſſiſting to him therein upon his ſummons; and they are puniſhable by fine and impriſonment in default thereof.

(a) 2 *Co. Inſtit. p.* 172.

And

And altho the ſheriff in his *Turn* had power to take preſentments of felonies at common law, yet this was not intended barely of iſſuing precepts upon ſuch inquiſitions, but to a miniſterial taking of felons as he was conſervator of the peace, for his *Turn* was kept but twice in the year, but the occaſions of taking felons were frequent.

And accordingly it was practiſed, *vide* 5 *H.* 7. 5. *a. in fine*, the ſheriff arreſted one ſuſpected of felony, and no queſtion of the lawfulneſs thereof.

[88] III. *Coroners:* Tho coroners had no power of taking inquiſitions of any felony but the death of a man, as hath been ſhewn; and therefore by the expreſs proviſion of the ſtatute of 4 *E.* 1. *De officio coronatoris* he may not only make proceſs but make hue and cry after them, yet by the ſtatute of *Weſtminſt.* 1. *cap.* 9, above-mentiond he is a conſervator of the peace in relation to all felonies, and can command them to be apprehended, tho he can take no inquiſition concerning any but the death of a man.

IV. For the office of *conſtable* it is of twofold extent. 1. Miniſterial and relative to the juſtices of peace, coroners, ſheriffs, *&c.* whoſe precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conſervator of the peace at common law.

By the original and inherent power in the conſtable he may for breach of the peace and ſome miſdemeanors, leſs than felony, impriſon a perſon.

If a man leaves an infant in the cold to the intent to deſtroy it, or charge the pariſh, the conſtable may take him and put him in the ſtocks. *M.* 34 & 35 *Eliz. B. R. Croke, n.* 1. *Beal* and *Charter, p.* 287.

So if a conſtable be aſſaulted by *A.* tho it be in his own caſe, he may impriſon the party and carry him to gaol; but for opprobrious words, or a general hindrance of him to ſummon the trained bands to attend the lord mayor of *London* upon his precept, he cannot juſtify the impriſoning of a perſon in the *Compter*, *T.* 31 *Eliz. Rot.* 1521. *Fulwood* and *Gaſcoign (c)*; but he muſt bring him to a juſtice of peace: *nota*, in the juſtification it was alſo adjuged, that he aſſaulted him: *ideo quære* of that judgment.

(c) *Savil. p.* 97.

And

And what may be done by a conſtable may be done by his deputy, for by the law a conſtable may make a deputy, and he is within the ſtatute of 7 *Jac. cap.* 5. to plead the general iſſue. *M.* 13 *Jac. B. R. Phelps* and *Winchcombe (d).*

If *A.* menace *B.* to kill him, upon complaint thereof to the conſtable he may arreſt him and put him into the ſtocks, till he find ſurety of the peace, 44 *E.* 3. *Barre* 202. but that is [89] intended, that he may detain him till he can conveniently bring him to a juſtice of peace and to avoid the preſent danger, for tho ſome of the old books ſeem to hold, that the conſtable may take ſureties of the peace and detain a perſon till he gives him ſureties, yet it cannot be by recognizance but by bond, and that for an affray or menace of breach of the peace done in his view. *H.* 37 *Eliz. B. R. Croke, n.* 25. *Sharrock* and *Hanmer (e).*

If information be given to a conſtable, that a man and woman are in incontinency together, he may take the neighbours and arreſt them, and commit them to priſon to find ſureties for their good behaviour, 1 *H.* 7. 6. *a.* there the cuſtom of *London* indeed is pleaded; but 13 *H.* 7. 10. *b.* adjudged, that it is a good juſtification for the conſtable or any in aſſiſtance to plead, that *A.* holds a meſſuage in the ſame vill, and ſhe kept perſons ſuſpected of common bawdry, and the plaintiff ſuſpiciouſly reſorted to that houſe with women of ill fame, and that he arreſted the plaintiff to find ſureties for the good behaviour.

The conſtable may arreſt ſuſpicious night walkers *(f)* by the ſtatute of 5 *E.* 3. *cap.* 14. and men that ride armed in fair or markets or elſewhere. *Stat.* 2 *E.* 3. *cap.* 3. *de Northampton.*

And it appears by the books before-mentioned, that in caſes of arreſts of this or the like nature, the conſtable may execute his office upon information and requeſt of others, that ſuſpect and charge the

(d) Moor p. 845.

(e) Cro. Eliz. p. 375.

(f) But then that ſuſpicion muſt not be a mere cauſeleſs ſuſpicion, but muſt be founded upon ſome probable reaſon; and ſo it was ruled in the caſe of the Queen and *Tooley, Mich.* 1709. for the murder of *Dent*, who was kild in aiding the conſtable, who had taken up a woman, that was walking the ſtreet upon ſuſpicion, as being a woman of ill fame. *C. J. Holt* deliverd the reſolution of the court, that it was not murder, and gave this for one reaſon, "That it was not lawful even for a legal "conſtable to take up a woman upon a "bare ſuſpicion only, having been guilty "of no breach of the peace nor any un-"lawful act: and as to the caſe in 13 *H.* 7. "10. the reaſon thereof was, becauſe it "was in the view of the conſtable, who "found her miſdoing; that of late, con-"ſtables made a practice of taking up "people only for walking the ſtreets, but "he knew not whence they had ſuch an "authority. *MS. Rep.*

offenders,

offenders, nay tho it be but with ſuſpicion thereof. 5 *E.* 3. *cap.* 14. 13 *H.* 7. 10. *b.* 44 *E.* 3. *Barre* 202.

But if there be an affray, tho to prevent it, or in the time of the affray the conſtable may upon information or complaint arreſt the offender, yet it is held, that if the affray be paſt, and no danger of death, the conſtable cannot arreſt the parties without a warrant from a juſtice of peace. 38 *E.* 3. *B. Faux Impriſonment* 6.

But the law ſeems contrary, for tho in that caſe he cannot take ſurety of the peace himſelf, yet upon a complaint to him he may arreſt the party to bring him before a juſtice to find ſurety of the peace, or for appearance. 44 *E.* 3. *Barre* 202. 35 *Eliz. Sharrock*'s caſe.

Now as touching the conſtable's power of arreſting *ex officio* in relation to felonies it may come under theſe conſiderations, 1. What his power is to arreſt when a felony is *certainly* committed. 2. What his power is to arreſt in caſes of *ſuſpicion* of felony. 3. What his power is in caſe of *danger* of felony, tho none be committed, as in caſe of affrays or dangerous wounding.

1. As to the firſt of theſe, where a felony is committed, it is of all hands agreed, that he may *ex officio* arreſt and impriſon the felon till he can conveniently be conveyed to a juſtice of peace or the common gaol.

And it will be all one, whether the felony were committed in the ſame vill, or in any other vill or county, if the felons be within the vill where he is conſtable.

And this appears clearly by the books of 2 *H.* 7. 15 *b.* 7 *E.* 4. 20. *a.* and divers others, and by the ſtatute of *Weſtm.* 1. *cap.* 9. 5 *E.* 3. *cap.* 14.

And in that caſe it is on all hands agreed.

1. That he may break open doors to take the felon, if the felon be in the houſe, and his entry denied after demand and notice that he is conſtable.

2. That if in ſuch an attempt of arreſt the conſtable or any that come in his aſſiſtance be kild after competent notice that he is conſtable, it is murder.

[91] 3. That if the felon reſiſt and cannot be taken, whether it be after the arreſt or before, the killing of the felon, who cannot be otherwiſe taken, is no felony.

And the reaſon of all this is, becauſe he is *ex officio* a conſervator of the peace, and is not only permitted but by law injoind to take a felon,

felon, and if he omits his duty herein, he is indictable and ſubject to a fine and impriſonment.

And it is not material, whether he ſaw the felony committed, or hath it only by complaint or information; for as well in one caſe as the other he is bound to apprehend the felon, and make ſearch after him within the limits of his juriſdiction, and to raiſe *hue* and *cry* upon him; and certainly what may be done upon *hue* and *cry* raiſed upon a felon may be done by that conſtable who upon the firſt complaint raiſeth it; and the law gives him protection in the execution of his office, and will never puniſh him in the neceſſary purſuit of what it injoins him.

And with this all the before cited books in the precedent chapter do agree; for I have before therein determind, that in this caſe a private perſon may kill a felon, who is really ſuch, if he cannot otherwiſe be taken; *vide ſupra*, *p.* 77.

2. I come to the *ſecond*, namely what if there be a felony done, (ſuppoſe a robbery upon *A.*) and *A.* ſuſpects *B.* upon probable grounds to be the felon, and acquaints the conſtable with it, and deſires his aid to apprehend him; in this caſe I ſay,

1. That the conſtable may apprehend *B.* upon this account, tho the ſuſpicion ariſe in *A.* at firſt; and with this agree the ſtatutes of 3 *E.* 1. *cap.* 9. and 5 *E.* 3. *cap.* 14. and the books of 2 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b.* *Semain*'s caſe, *Dalt. cap.* 109. *p.* 292. *(g)*, 13 *E.* 4. 9. *a.* *accords* 2 *H.* 7. 15. *b.* tho *Brian* be to the contrary; but there are to be theſe circumſtances to accompany it, 1. *A.* the perſon ſuſpecting ought to be preſent, for the juſtification is, that he did aid *A.* in taking the party ſuſpected, 2 *H.* 7. 15. *b.* He ought to inquire and examine the circumſtances and cauſes of the ſuſpicion of *A.* which tho he cannot do it upon oath, yet ſuch an information may carry over the ſuſpicion even to the conſtable, whereby it may become his ſuſpicion as well as the ſuſpicion of *A.* [92] And if the conſtable ſhould not be allowd this latitude in caſes of this nature, many felons would eſcape, and the party arreſted hath no prejudice thereby, for the juſtice of the peace, to whom in ſuch caſes he is properly to be brought, may conſider the circumſtances, and poſſibly in ſome caſes diſcharge or bail him, and upon his trial, if innocent, he will be diſcharged. 3. But there muſt be a felony in fact

(g) *New Edit. cap.* 162. *p.* 535.

done

done, and the conſtable muſt be aſcertained of *that*, and aver it in his plea, and it is iſſuable.

2. Conſequently, if the conſtable upon ſuch an arreſt or attempt thereof be kild, it is murder as well as in the former caſe.

3. That in ſuch caſe, if the ſuppoſed offender fly and take houſe, and the door will not be opened upon demand of the conſtable and notification of his buſineſs, the conſtable may break open the door, tho he have no warrant. 13 *E.* 4. 9. *a.* for it is a proceeding for the king by perſons by law authorized, and therefore there is virtually a *non omittas* in the actings of their authority.

And the reaſon of the difference between private perſons arreſting upon ſuſpicion and conſtables is, 1. Becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it, and therefore they cannot break open doors; but in caſe of a conſtable he is puniſhable if he omits it upon complaint. 2. Becauſe it would be a great inconvenience if every private man upon pretence of ſuſpicion ſhould break open houſes, for they may not be of known value or reſponſible; but a conſtable is an officer known within the vill, and his authority known, and is preſumed of ſufficiency, for he is choſen by the leet, like a bailiff *jurus & conus*, who need not ſhew his warrant (*).

Again it ſeems to me, that if a perſon thus charged with ſuſpicion of felony upon juſt grounds of ſuſpicion, and where a felony is actually committed, tho he be innocent, yet if he reſiſt the officer after notice that he is the officer, and aſſault him, if the officer kill him, it is no murder.

[93]

But it may be more queſtionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is ſuſpected and innocent, if he cannot be otherwiſe taken, as he may a felon, as before is ſhewn, *p.* 77. but it ſeems he may, and it is no felony no more than in the former caſe, for theſe reaſons, 1. Becauſe the conſtable is obliged to do his office in caſe of a probable ſuſpicion, as well as in caſe of an actual felony. 2. Becauſe he cannot judge, whether the party be guilty or not, till he comes to his trial, which cannot be till he be apprehended. 3. Becauſe the party draws upon himſelf this inconvenience, and makes himſelf ſuſpected by his very flight from the known officer.

(*) *Vide Part* I. *p.* 461.

And

And this is the reaſon why, tho a man be innocent of a felony committed, yet if he fled for it, and *that* be preſented by the coroner, or found by the jury *that* acquits him of the felony, yet he forfeits his goods, becauſe it was his own fault that he did not *ſtare juri*, and brought upon himſelf the juſt cauſe of ſuſpicion, and put the country to trouble and hazard in purſuing him.

And yet it is true, that if the felon were not once in the hands of an officer that had warrant to arreſt, as if he be in the houſe, and fly out at a back-door before the officer ſeizeth him, this is not an eſcape in the officer, 27 *Aſſiz.* 9. But on the other ſide it may be ſaid, that it is nevertheleſs an eſcape in the townſhip, for which they ſhall be amerced, tho the perſon were never actually taken; *quod vide ſupra, cap.* 10.

And therefore it is at the peril of the whole vill, if they take not a felon (*), and when he is upon probable cauſe ſuſpected, he is preſumed to be ſuch, till the contrary appear upon his trial.

And therefore, as before is ſaid, a juſtice of peace cannot diſcharge a perſon brought before him but for ſuſpicion of felony, in caſe a felony were committed, but muſt either bail or commit him.

And upon the reaſon before given it ſeems, that if a perſon be charged to the conſtable for felony, or ſuſpicion of [94] felony in the county of *A.* and the conſtable charge him in the king's name to yield himſelf, and he either before or after the arreſt purſue him into another vill, nay into another county, the conſtable hath the ſame privilege and protection upon his purſuit and arreſt, as if he were taken in the county of *A.* tho yet he muſt bring him before the juſtice of that county where he was taken: *vide Crompton de Pace, p.* 172, 173. *Dalt. p.* 340. *(h).*

But for this latter caſe I take the law to be all one in caſe of a conſtable having a warrant to arreſt a felon, or not having one, but doing it by his own intrinſic power *virtute officii*, namely, that if he hath or hath not a warrant from a juſtice of peace to arreſt a felon, if the felon fly into another county before arreſt, he is to be brought before a juſtice of that county, or to the gaol of that county, where he is arreſted; but if he were once arreſted and eſcape, and upon freſh ſuit he is taken by the conſtable in another county, yet he may

(*) This holds only as to felony touching the death of a man, but not in caſe of other felony, as theft, &c. *vide ſupra, p.* 73.

(*h*) *New Edit. p.* 534.

be brought back to the juſtice, or gaol of that county where he was firſt arreſted (*); for in that caſe in ſuppoſition of law he is always in cuſtody by force and authority of the firſt arreſt, as well where the arreſt was *virtute officii*, as where done by a warrant. *Vide* 2 *E.* 4. 6. *b.* 13 *E.* 4. 8. *b.*

And thus far touching the ſecond caſe.

3. The *third* caſe is, where a felony is not yet committed, but in danger to be committed.

If *A.* hath wounded *B.* ſo that he is in danger of death, and *A.* flies and takes his houſe, and ſhuts the doors, and will not open them, the conſtable of the vill where it is done, or upon hue and cry, may break the doors of the houſe to take him, if upon demand he will not yield himſelf to the conſtable. 7 *E.* 3. 16. *b.* *Barre* 291.

And in that caſe, if the conſtable be kild, it is murder; if he kill *A.* if he cannot be otherwiſe taken, it is no felony, but excuſable and juſtifiable by the neceſſity cauſed by the obſtinacy and default of *A.*

[95] If there be an affray in the houſe, where the doors are ſhut, whereby there is likely to be manſlaughter or blood-ſhed committed, the conſtable of the vill having notice thereof, and demanding entrance, if they *within* refuſe to do it, but continue the affray, the conſtable may break open the doors to keep the peace and prevent the danger.

Nay yet farther, if there be diſorderly drinking or noiſe in an houſe at an unſeaſonable time of night, eſpecially in inns, taverns, or alehouſes, the conſtable or his watch demanding entrance, and being refuſed, may break open the doors to ſee and ſuppreſs the diſorder; and this is conſtantly uſed in *London* and *Middleſex*.

I come now in the *laſt* place to conſider what the conſtable is to do with his priſoner that he hath thus arreſted for felony, or other cauſes above-mentiond.

In caſe of a ſudden affray through paſſion or exceſs of drink, he may put the perſons in the ſtocks, or in a priſon, if there be one in the vill, till the heat of their paſſion or intemperance is over, tho he delivers them afterwards, or till he can bring them before a juſtice of peace.

If an offenſe be committed, for which the conſtable may arreſt, he may convey them to the ſheriff, or his gaoler of the county; and

(*) *Vide Part* I. *p.* 580.

if

if it be within a franchiſe, he may deliver them to the gaol of the franchiſe, and they are bound to receive them without taking any fine for the ſame by the ſtatute of 4 *E.* 3. *cap.* 10. *vide* 5 *H.* 4. *cap.* 10. 23 *H.* 8. *cap.* 2. But the ſafeſt and beſt way in all caſes, is to bring them to a juſtice of peace, and by them the priſoner may be bailed or committed, as the caſe ſhall require; but till they are bailed or diſcharged, or the ſheriff or gaoler hath received them, they are ſtill under the charge of the conſtable that took them. 10 *H.* 4. 7. *a. Eſcape* 6. Till the conſtable can conveniently convey the parties arreſted to a juſtice of peace, or the common gaol, as when the arreſt is in or near night, he may detain the party in the ſtocks; or if there be no ſtocks in that vill, he may bring them to the ſtocks of the next adjacent vill.

And if the perſon be of quality or ſick, the conſtable may [keep him in an houſe *(i)*] for a day and a night at leaſt, [96] and in ſome caſes of neceſſity for a longer time, till he can with ſafety and conveniency convey him to a juſtice of peace, or the common gaol. 20 *E.* 4. 6. *b.* 22 *E.* 4. 35. *b. Dalt. p.* 340.

The charges of ſending malefactors to gaol by the common law, is to be borne by the vill where they are apprehended. 3 *E.* 3. *Coron.* 328. 4 *E.* 3. *cap.* 10.

But now by the ſtatute of 3 *Jac. cap.* 10. the charge is to be borne by the priſoner, if he hath wherewith, the ſame to be levied by warrant of the juſtices of peace; and if he hath not wherewith, then the charge to be borne by the pariſh, townſhip, or tithing, where the offender is apprehended, by a tax or rate to be made, as by the ſaid act is preſcribed.

And what I have herein ſaid touching the conſtable is applicable to a tithing-man, headborough, burtholder, for their authority is much the ſame.

But the conſtable of the hundred is a diſtinct officer, and introduced upon the ſtatute of *Winton*, *vide H.* 37 *Eliz. B. R. Croke*, *n.* 25. *Sharrock* and *Hanmer*; yet he ſeems to be a conſervator of the peace.

V. *Watchmen*: Watchers are of three kinds, 1. That which is appointed by the ſtatute of *Winton*, *cap.* 4. which is that from *Aſcenſion-day* until *Michaelmas*, watches ſhall be kept in all towns from

(i) Theſe words are not in the *MS.* but they or others to the like effect are manifeſtly wanted to ſupply the ſenſe.

ſun-ſetting to ſun-riſing in boroughs, *&c.* by twelve, in other towns by ſix or four, according to the number of the inhabitants: this watch is to be ſet by the conſtable, and the neglect thereof puniſhable by 5 *H.* 4. *cap.* 3. Their power is to arreſt ſuch as paſs by until the morning, and if no ſuſpicion, they are then to be delivered, and if ſuſpicion be touching them, they ſhall be delivered to the ſheriff, *viz.* to the common gaol, there to remain until they be in due manner delivered; and if they will not obey the arreſt, hue and cry ſhall be levied upon them; but this watch extends only between *Aſcenſion day* and *Michaelmas.*

[97]

2. But there is another watch that may be kept by the conſtable *ex officio*, which may extend to other times, becauſe there be other things under his charge, as a conſervator of the peace, as for the purpoſe to raiſe or purſue hue and cry upon robberies committed by the ſtatute of *Winton*, *cap.* 1. to ſearch for lodgers in ſuburbs of cities, that are ſuſpicious perſons, which is to be done every week, or at leaſt once in fifteen days by the ſame ſtatute, *cap.* 4. for ſuch as ride or go armed by the ſtatute of 2 *E.* 3. *cap.* 3. for night-walkers and perſons ſuſpicious either by night or day by the ſtatute of 5 *E.* 3. *cap.* 14.

And altho a conſtable is not bound to any preciſe time for this kind of watch, nor puniſhable, if he omit it barely for the omiſſion, if he be ready upon occaſion to do his office, when required in theſe caſes, yet it is in his power to hold ſuch watches, as often as he pleaſes, and it is convenient and juſtifiable, and herein the watchmen are the miniſters and aſſiſtants of the conſtable, and are under the ſame protection with him, and may act as he doth; and regularly he ought to be in company with them in their walk and watch.

3. There is yet a third kind of watch, which is by authority of the juſtices of peace, which may be held at other times than the ſtatute of *Winton* appoints, and the watch thus appointed hath the ſame power as either of the former; and this ſeems to be within the power of any one juſtice of peace by the firſt *Aſſignavimus* in his commiſſion; *vide Lamb. Juſtic. Lib.* I. *cap.* 20. *p.* 185. *Dalt. cap.* 60. *p.* 142. *(k)*, and *cap.* 109. *p.* 292. *(l)*; but the ſafer way and more uſual is by order of the ſeſſions of the peace or of the court of king's bench, which hath the higheſt ordinary authority in matters of the peace and preſervation thereof.

(k) New Edit. cap. 104. *p.* 352. *(l) New Edit. cap.* 109. *p.* 536.

Now

Now a watchman hath a double protection of the law, *viz.* 1. As an aſſiſtant to the conſtable, when the conſtable is preſent or in the watch, for ſo every man, who is aſſiſting to the conſtable in the execution of his office, hath the ſame protection, that the law gives the conſtable. 2. Purely as a watchman ſet by [98] order of law; and the law takes notice of his authority *ſub eo nomine*, and therefore killing of a watchman in execution of his office is murder. *Co. P. C. cap.* 7. *p.* 52. 9 *Co. Rep.* 66. *a. Mackally's* caſe.

And ſuch a watchman may apprehend night-walkers and commit them to cuſtody till the morning, and alſo felons and perſons ſuſpected of felony.

And thus far of arreſts *virtute officii*.

See Burn. Tit. Arreſt. per tot. Index to 2 Hawk. P. C. Tit. Arreſt. Foſter 136, 319, 320 & 4. Blackſ. Com. ch. 21. Of arreſts; pa. 289, &c. See Burn. Tit. Conſtable. Burn. tit. Watch.

CHAP. XII.

Of arreſts of felons *upon* hue *and* cry *raiſed*.

HUE and *cry* is the old common law proceſs after felons and ſuch as have dangerouſly wounded any perſon: And this hath received great countenance and authority by ſeveral acts of parliament.

By the ſtatute of *Weſtm.* 1. *cap.* 9. *(a)*, it is enacted, "That all "be ready and apparelled at the ſummons of the ſheriff & *a cry de* "*pays* to purſue and arreſt felons as well within franchiſes as with- "out; and if they do it not and be thereof attaint, *le roy prendra a* "*eux grevement*, they are to be indicted and fined for the neglect.

By the ſtatute of 4 *E.* 1. *De officio coronatoris* "*Hue* and *cry* ſhall "be levied for all murders, burglaries, men ſlain, or in peril to be "ſlain, as other-where is uſed in *England*, and all ſhall follow the "*hue* and ſteps as near as they can; and he that doth not, and is "convict thereof, ſhall be attached to be before the juſtices in *eyre*."

By the ſtatute of *Winton*, *cap.* 1. "From henceforth every coun- "try ſhall be ſo well kept, that immediately upon robberies and

(a) 2 *Co. Inſtit. p.* 171.

" felonies committed freſh ſuit ſhall be made from town to town, " and from country to country:" and *cap.* 4. " If any will not " obey the arreſt of the town, where night-walkers paſs, they " ſhall levy *hue* and *cry* upon them; and ſuch as keep the town, " (*viz.* the bailiff or conſtable), ſhall follow with *hue* and *cry* with " all the town and the towns near; and ſo *hue* and *cry* ſhall be made " from town to town, until they are taken and deliverd to the ſhe- " riff; and for arreſtments of ſuch ſtrangers none ſhall be pu- " niſhed."

And this is in truth but the antient law; thus it appears by *Bracton, Lib.* III. *cap.* 1. where he mentions a proviſion *per dominum regem & ejus conſilium*, (which muſt be intended an antient act of parliament,) *quòd omnes tàm milites quàm alii, qui ſunt quindecim annorum & ampliùs, jurare debent, quòd utlegatos, murdratores, robbatores, & burglatores non receptabunt, nec iis conſentirent, nec eorum receptatoribus, &, ſi quos tales noverint, eos attachiari faciem, & hoc vice-comiti & bellivis ſuis monſtrabunt, & ſi hueſium vel clamorem de talibus audiverint, ſtatim audito clamore ſequentur cum familiâ & hominibus de terrâ ſuâ* (*).

And it is one of the articles of inquiry in the leet in the ſtatute *de viſu franci plegii, de hues levies & nient purſues*, and among the *capitula Itineris de hueſio levato & non ſecuto: vide Coke ſuper ſtat. Weſim.* 1. *cap.* 9. 2 *Inſtit. p.* 172.

And altho it is a good courſe to have a juſtice of peace to direct his warrant for raiſing *hue* and *cry* to prevent cauſeleſs *hues* and *cries*, yet it is neither of abſolute neceſſity nor ſometimes convenient; for the felons may eſcape before the juſtice can be found, and *hue* and *cry* was part of the law before the ſtatute of 1 *E.* 3. *cap.* 16. which firſt inſtituted juſtices of peace.

And altho alſo it is ſpecially incumbent upon conſtables to purſue *hue* and *cry*, when called upon, and they are ſeverally puniſhed, if they neglect it (*b*), and it prevents many inconveniencies, if they be there; for it gives a greater authority to their purſuit, and [100] enables the purſuants in his aſſiſtance to plead the general

(*) *Vide Part* I. *p.* 23 & 24. *in notis.*

(*b*) By 8 *Geo.* 2. *cap.* 16. " If any " conſtable, headborough, &c. within the " hundred wherein any robbery ſhall hap- " pen, ſhall refuſe or neglect to make " *hue* and *cry* after the felons with the " utmoſt expedition, as ſoon as he ſhall " receive notice thereof, he ſhall, for " every ſuch refuſal or neglect, forfeit " five pounds, one half to the king, and " the other half to ſuch perſon as ſhall " ſue for the ſame."

iſſue

iſſue upon the ſtatutes of 7 & 21 *Jac.* without being driven to ſpecial pleading; and therefore to prevent inconveniencies that may happen by unrulineſs, it is moſt adviſeable, that the conſtable be called to this action.

Yet upon a robbery or other felony committed, *hue* and *cry* may be raiſed by the country in the abſence of the conſtable, it is therefore called *Cry de pais*.

Neither is there any inconvenience conſiderable in it; for if *hue* and *cry* be raiſed without cauſe, they that raiſe it are puniſhable by fine and impriſonment. 2 *Co. Inſtit. p.* 173.

And accordingly it was agreed by the two chief juſtices and three other judges, upon the trial of *Packhurſt*, *Jackſon*, and others, who were all convicted of murder, and executed, for killing two of the countrymen that followed them, being highway robbers. *Lent* vacation, *anno Car.* 2. 26.

In this matter of *hue* and *cry* theſe things are conſiderable, *viz.* 1. By whom it is to be levied. 2. How it is to be levied. 3. In what manner to be purſued. 4. What may be done by them that purſue it. 5. How puniſhed, if omitted or neglected.

I. *Hue* and *Cry* may be raiſed as well by an officer of juſtice, as by the precept of a juſtice of peace upon information of a felony.

Or it may be raiſed by any private perſon that is robbed, or knows of any felony.

II. Touching the manner of it: It is diverſe according to a variety of circumſtances. 1. The party that levies it ought to come to the conſtable of the vill, and give him notice of a felony committed, and give him ſuch reaſonable aſſurance thereof as the nature of the caſe will bear. 2. If he knows the name of him that did it, he muſt tell the conſtable the ſame. 3. If he knows it not, but can deſcribe him, he muſt deſcribe his perſon, or his habit, or his horſe, or ſuch circumſtances that he knows, which may conduce to his diſcovery. 4. If the thing be done in the night, ſo that he knows none of theſe circumſtances, he muſt mention the number of the perſons, or the way they took. 5. If none of all theſe can be diſcoverd, as where a robbery, or burglary, or felony is committed in the [101] night, yet they are to acquaint the conſtable with the fact, and deſire him to ſearch in his town for ſuſpected perſons, and to make *hue* and *cry* after ſuch as may be probably ſuſpected as being perſons vagrant

in the ſame night, for many circumſtances may *ex poſt facto* be uſeful for diſcovering a malefactor, which cannot be at firſt found *(c)*.

III. In what manner it is to be purſued. 1. The conſtable is to make ſearch in his own vill, 2 *E.* 4. 8 & 9. 2. He is to raiſe all the neighbouring vills next about, *Crompt. de Pace, f.* 178. *b.* 3. It is to be purſued with horſe and foot: *vide* 27 *Eliz. cap.* 13. *Dalt. cap.* 28. *p.* 75. *(d)*, *per direction de Hyde*, chief juſtice.

IV. What may be done in purſuance of a *hue* and *cry* levied, and therein I think as followeth:

1. That in caſe of *hue* and *cry* once raiſed and levied upon ſuppoſal of a felony committed, tho in truth there was no felony committed, yet thoſe that purſue *hue* and *cry* may arreſt and proceed, as if ſo be a felony had been really committed.

And therefore the juſtification of an impriſonment by a perſon upon ſuſpicion, and by a perſon, eſpecially a conſtable, upon *hue* and *cry* levied do extremely differ; for in the former, there muſt be a felony averred to be done, and it is iſſuable; but in the latter, *viz.* upon *hue* and *cry* it need not be averred, but the *hue* and *cry* levied upon information of a felony is ſufficient, tho perchance the information were falſe; and therefore I do not find any averment of a felony committed in caſe of a juſtification of an impriſonment upon *hue* and *cry*. 5 *H.* 7. 5. *a.* 21 *H.* 7. 28. *a. per Rede*, 2 *E.* 4. 8 & 9 [102]

And the reaſons hereof are theſe. 1. Becauſe the conſtable cannot examine the truth or falſhood of the ſuggeſtion of him that firſt levied it, for he cannot adminiſter him an oath, and if he ſhould forbear his purſuit of the *hue* and *cry*, till it be examined by a juſtice of peace, the felon might eſcape, and the purſuit would be loſt and fruitleſs. 2. Becauſe the conſtable is by the acts of parliament

(c) By 27 *Eliz. cap.* 13. To the levying of *hue* and *cry*, ſo as to charge the hundred for any robbery it is requiſite, "That the party robbed do, with all convenient ſpeed, give notice thereof to "the inhabitants of ſome town, village, or "hamlet, near the place where the robbery was committed;" And by 8 *Geo.* 2. *cap.* 16. it is further required, "That the party robbed do, with all convenient ſpeed, give notice thereof to "ſome conſtable, headborough, &c. of "ſome town, &c. near the place of the "robbery, or leave notice in writing of "ſuch robbery at the dwelling-houſe of "ſuch conſtable, &c. deſcribing, as far "as the nature and circumſtances of the "caſe will admit, the felon or felons, and "the time and place of the robbery; and "alſo within twenty days next after the "robbery committed, cauſe public notice "to be given thereof in the *London Gazette*, therein likewiſe deſcribing the "felon or felons, and the time and place "of ſuch robbery, together with the "goods whereof he was robbed." See 2 WILSON 112, 113.

(d) New Edit. cap. 54. *p.* 169.

before-

before-mentiond compellible to purſue *hue* and *cry*, and he is puniſhable, and ſo are thoſe of the vill, if they do it not, as appears by the acts of parliament above-mentiond. 3. Becauſe he that firſt raiſeth *hue* and *cry*, where no felony is committed, *viz.* the perſon that giveth the falſe information, is ſeverely puniſhable by fine and impriſonment, if the information be falſe. 21 *H.* 7. 28. *a.* 29 *E.* 3. 39. *a. b.* 2 *Co. Inſtit. p.* 173.

And therefore if he raiſe a *hue* and *cry* upon a perſon that is innocent, yet they that purſue the *hue* and *cry*, may juſtify the impriſonment of that innocent perſon, and the raiſer is puniſhable; and by the ſame reaſon, if he give notice of a felony committed, when there was in truth none.

2. If *hue* and *cry* be raiſed againſt a perſon certain for felony, tho poſſibly he is innocent, yet the conſtables, and thoſe that follow the *hue* and *cry*, may arreſt and impriſon him in the common gaol, or carry him to a juſtice of peace.

3. If the perſon purſued by *hue* and *cry* be in a houſe, and the doors are ſhut, and refuſed to be opened, upon demand of the conſtable, and notification of his buſineſs, he may break open the doors; and this he may do in any caſe where he may arreſt, tho it be only a ſuſpicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the caſe: *vide* 5 *Co. Rep.* 92. *b. Semain*'s caſe. And the ſame law is upon a dangerous wound given, and a *hue* and *cry* levied upon the offender. 7 *E.* 3. 16. *b. Barre* 291.

And it ſeems in this caſe, that if he cannot be otherwiſe taken, he may be kild, and the neceſſity excuſeth the conſtable: *vide Part* I. *cap.* 9. *p.* 53.

4. Upon *hue* and *cry* levied againſt any perſon, or where any *hue* and *cry* comes to a conſtable, whether the perſon be certain or uncertain, the conſtable may ſearch in ſuſpected places within his vill for the apprehending of the felons. *Dalt. cap.* 28. *p.* 75. *(e)*, *Crompt. de Pace*, *f.* 178. *b.* 2 *E.* 4. 8. *b.* [103]

But tho he may ſearch ſuſpected places or houſes, yet his entry muſt be *per oſtia aperta*, for he cannot break open doors barely to ſearch, unleſs the perſon againſt whom the *hue* and *cry* is levied be there, and then it is true he may; therefore in caſe of ſuch a ſearch,

(e) New Edit. cap. 54. *p.* 169.

the

the breaking open the door is at his peril, *viz.* juſtifiable, if he be there; not juſtifiable, if he be not there; but it muſt be always remembered, that in caſe of breaking open a door, there muſt be firſt a notice given to them within of his buſineſs, and a demand of entrance, and a refuſal before doors can be broken.

5. If the *hue* and *cry* be not againſt a perſon certain, but by deſcription of his ſtature, perſon, clothes, horſe, &c. the *hue* and *cry* doth juſtify the conſtable, or other perſon following it, in apprehending the perſon ſo deſcribed, whether innocent or guilty, for that is his warrant, it is a kind of proceſs, that the law allows (not uſual in other caſes), *viz.* to arreſt a perſon by deſcription.

6. But if the *hue* and *cry* be upon a robbery, burglary, manſlaughter, or other felony committed, but the perſon that did the fact is neither known nor deſcribible by perſon, clothes, or the like, yet ſuch a *hue* and *cry* is good, as hath been ſaid, and muſt be purſued, tho no perſon certain be named or deſcribed.

And therefore in this caſe all that can be done is for thoſe that purſue the *hue* and *cry*, to take ſuch perſons as they have probable cauſe to ſuſpect; as for inſtance, ſuch perſons as are vagrants, that cannot give an account where they live, whence they are, or ſuch ſuſpicious perſons as come late into their inn or lodgings, and give no reaſonable account where they had been, and the like: *vide* 2 *E.* 4. 8. *b.*

[104] And here the juſtification of the impriſonment is mixed partly upon the *hue* and *cry*, and partly upon their own ſuſpicion; and therefore, 1. In reſpect that it is upon *hue* and *cry* there needs no averment that the felony was done, yet it muſt be averred; that an information was given, that the felony was done, if the arreſt be by that conſtable that firſt received the information, and ſo raiſed the *hue* and *cry*; or if the arreſt were made by that conſtable, or thoſe vills to whom the *hue* and *cry* came at the ſecond hand, it muſt be averred that ſuch a *hue* and *cry* came to them purporting ſuch a felony to be done; but, 2. Alſo in as much as the *hue* and *cry* neither names nor deſcribes the perſon of the felon, but only the felony committed, and therefore the arreſt of this or that particular perſon, and ſo applied, is left to the ſuſpicion and diſcretion of the conſtable, or the people of the ſecond or third vill, he that arreſts any perſon upon ſuch general *hue* and *cry* muſt aver that he ſuſpected, and ſhew a reaſonable cauſe of ſuſpicion.

But

But now by the ſtatute of 7 *Jac. cap.* 5. the conſtable or any that come in his aſſiſtance, even in this caſe of *hue* and *cry*, may plead the general iſſue, and give the whole matter of the juſtification in evidence for the purſuit of *hue* and *cry*, tho performed by others as well as the conſtable, is principally the act of the conſtable of the vill, and the others are but as his deputies or aſſiſtants within the precincts of their conſtable-wick.

V. For the laſt matter, how the neglect of the purſuit of *hue* and *cry* is to be puniſhed, it hath been before declared upon the ſtatutes of 3 *E.* 1. *cap.* 9. 4 *E.* 1. and 13 *E.* 1. of *Winton*, they are to be indicted, fined and impriſoned.

Burn. tit. Hue and Cry. Index to 2 Hawk. P.C. tit. Hue and Cry. 4 Blackſ. Com. ch. 21. p. 293.

CHAP. XIII. [105]

Arreſts of felons virtute præcepti, *or of* warrants.

I COME now to conſider of arreſts of felons or perſons ſuſpected of felony by warrant or precept, namely not of precepts that iſſue upon matter of record, as upon appeals or indictments, which regularly are to be by writ, but ſuch warrants as are preparatory to it, or for conſervation of the peace.

And herein regularly all courts and perſons, that have judicial power by the common law, or by act of parliament for the conſervation of the peace, have power to grant warrants for arreſting of felons; but ſuch as are ſimply miniſterial and have no juriſdiction, as conſtables, cannot iſſue warrants for that purpoſe, but muſt do their office either alone, or with others called to their aſſiſtance.

The court of king's bench hath not only a power to iſſue writs upon indictments or appeals before them, but have alſo power by order to command the ſheriff of the county where they ſit, or the marſhal of the court, to apprehend felons or diſturbers of the peace, and bring them before the court; and this is warrantable by the cuſtom of the court, which is part of the law of the land.

Yea I have known by great advice, that where there hath been information upon oath of a breach of the peace, and a deſign by

perſons

perſons whoſe names could not be known, to commit a riot or breach of the peace, an order hath been made by the court to the ſheriff to bring before them ſuch perſons as ſhould be probably ſuſpected to be parties therein, and to bring them into the court, *M.* 23 *Car.* 2. in *Storie*'s caſe, for attempting to take away the daughter of Mrs. *Gilburn* with maſks and vizards.

See before *cap.* 1. concerning the king's bench.

[106] A commiſſion iſſues out of the *chancery* under the great ſeal to take perſons that were notoriouſly famed of felony or treſpaſs, tho they were not indicted, and by virtue hereof the commiſſioners iſſue a precept to *B.* to take *J. S.* that had dangerouſly wounded another; this was admitted a good juſtification in the officer, tho the commiſſion itſelf was againſt law, 24 *E.* 3. 9. *B. Faux Impriſonment* 9. *Vide ſimile* 42 *Aſſiz.* 5. where a commiſſion iſſuing out of *chancery* to take *J. S.* and his goods, before he was indicted, is ruled to be againſt law.

And therefore I would never adviſe thoſe general proclamations, that have ſometimes iſſued, to take certain perſons notoriouſly ſuſpected of felony but not indicted.

It is true, that ſuch a proclamation may be a means to give notice of felons, but ſo it may perchance include true men; and therefore what by law a conſtable, ſheriff, officer, or private perſons may do in arreſting of felons or ſuſpected perſons without ſuch a proclamation may be juſtifiable, but not by virtue of the proclamation, neither can any juſtification be made by virtue of it; and therefore ſuch proclamations againſt perſons not indicted are againſt law, and may bring great inconveniencies, 1. By leading the country into an error. 2. By the example itſelf, which may be of ill conſequence to honeſt men, as well as of uſe to apprehend felons.

27 *Aſſiz.* 35. A man was indicted of felony before juſtices of *oyer* and *terminer*: It is admitted, that the juſtices may not only award proceſs of outlawry thereupon, but may alſo iſſue a commiſſion (which is no other than a warrant under their hands and ſeals) to take the party, and that by virtue of ſuch a warrant or commiſſion they may break open doors, but they muſt ſhew their commiſſion, if demanded.

By the common law the ſheriff of the county might give out a warrant for the apprehending a felon before indictment; and this is farther confirmed by the ſtatute of 3 *E.* 1. *cap.* 9. *au commandment*,

& a les ſummons de viſcount & au cry de pays muſt be underſtood disjunctively, *(or at the cry of the country)* for the ſheriff had juriſdiction at the common law to take indictments of old felonies in his *Turn*; and ſo he hath ſtill, tho he is not now to make proceſs upon them by the ſtatute of 1 *E.* 4. *cap.* 2. [107]

The coroners have alſo power to attach manſlayers by their warrants after inquiſition, whereby they are found guilty, but that ſeems not to be all their power; but they may make out warrants for apprehending thoſe perſons that are not, or cannot be preſented before them, as thoſe that were preſent and not guilty; nay alſo of burglars and robbers, and yet they cannot take an inquiſition touching them; this appears evidently by the ſtatutes of 3 *E.* 1. *cap.* 9. and 4 *E.* 1. *Officium coronatoris.* And with this agrees the common uſage at this day for the coroners to take manſlayers before their inquiſition be taken, for many times the inqueſt is long in their inquiry, and the offender may eſcape, if he ſtay till the inquiſition deliverd up.

But becauſe at this day the greateſt part of the buſineſs of this nature is diſpatched by juſtices of the peace, I ſhall be more large touching their warrants, wherein nevertheleſs much of what is ſaid therein will be applicable to the warrants that iſſue in like caſes by other perſons.

And therein I ſhall principally conſider theſe particulars, 1. When and in what caſes they may iſſue their warrants for the apprehending of felons. 2. To whom. 3. How and in what manner ſuch precept or warrant is to iſſue. 4. What may be done by the officer in purſuance thereof.

I. As touching the firſt, in what caſes juſtices of peace may make warrants for the taking of felons or perſons ſuſpect of felony.

My lord *Coke* in his juriſdiction of courts, *cap.* 31. *p.* 176, 177. hath deliverd certain tenets, which, if they ſhould hold to be law, would much abridge the power of juſtices of peace, and condemn the conſtant and uſual practice, and give a looſe to felons to eſcape unpuniſhed in moſt caſes (*), *viz.* 1. That a juſtice of peace cannot upon complaint iſſue a warrant to apprehend a felon before indictment, grounding himſelf upon the haſty opinion of *Fitzherbert* and *Brudnell*, 14 *H.* 8. 16. *a.* who yet hold the officer excuſed, that makes the arreſt upon that warrant. 2. That admit he may

(*) *Vide Part* I. *p.* 575 & *ſupra p.* 79.

arreſt

arreſt, yet he cannot break open a houſe to take the felon by virtue of that warrant. 3. That admit he may arreſt by that warrant, yet he cannot iſſue a warrant in caſe only of ſuſpicion. 4. That admit he may, yet no houſe can be broken by virtue of ſuch warrant.

Touching the *ſecond* and *fourth* matter I ſhall conſider them, when I come to the buſineſs of the officer's power in purſuance of a juſtice's warrant; but touching the power of iſſuing this warrant by the juſtices of peace, I ſhall now conſider it: And therein I ſay as followeth.

1. That a juſtice of peace hath power to iſſue a warrant to apprehend a perſon accuſed of felony, tho not yet indicted.

That, upon which the doubt muſt ariſe to thoſe that made a doubt of it, muſt certainly be the ſtatutes of *Magna Charta*, *cap.* 29. *Nullus liber homo impriſonetur &c. niſi per legale judicium parium ſuorum vel per legem terræ.* 25 *E.* 3. *cap.* 4. "None ſhall be taken "upon ſuggeſtion made to the king or his council, unleſs it be by "preſentment or indictment, *&c.* or by writ original at the com-"mon law." 28 *E.* 3. *cap.* 3. "No man ſhall be taken, or im-"priſoned, or diſinherited, or put to death without being brought to "anſwer by due proceſs of law." 42 *E.* 3. *cap.* 3. "Whereas "upon falſe accuſations people have been brought before the king "and council, it is enacted, that no man ſhall be put to anſwer "without preſentment before juſtices or matter of record, or by due "proceſs and writ original according to the old law of the land.

Now all the weight of the queſtion upon theſe ſtatutes is to ſee what the law of the land is; for if theſe preparatory arreſts of felons be not againſt the law of the land, they are not reſtrained by theſe ſtatutes. Certainly by the law of the land, if a felony were committed, or but ſuſpected to be committed, a man might be arreſted by the party that knows, or upon probable grounds ſuſpects him to be the felon; or by a conſtable upon complaint, or upon *hue* and *cry*, and he might be carried to priſon, and there detained till deliverd by due courſe of law; and yet this perſon ſo arreſted not all this while indicted: *vide ſtatutes* 3 *E.* 1. *cap.* 9. 4 *E.* 3. *cap.* 10. and 5 *E.* 3. *cap.* 14. And all this was in order to preſerve the peace of the kingdom, and to ſuppreſs felons.

[109]

But this being not found effectual enough, by the ſtatute of 1 *E.* 3. *cap.* 16. for the better keeping and maintaining of the peace commiſſions

miſſions are to iſſue for the ſame in the ſeveral counties; this was their primitive inſtitution. Their power was enlarged by the ſtatute of 18 *E.* 3. *cap.* 2. to hear and determine felonies and treſpaſſes: and by the ſtatute of 34 *E.* 3. *cap.* 1. their power is farther enlarged, and particularly their taking as well perſons ſuſpected as indicted of felonies mentioned in that act is required, which, tho perchance it refer only to thoſe that have been robbers and gone beyond the ſea and ſince returned, yet it is a pattern for others.

Now by theſe ſtatutes ſurely as much power is intended to be tranſlated to the juſtices of peace in order to the preſervation thereof, as was in a conſtable or private perſon, for the juſtices of the peace are conſervators of the peace and more.

And let a man look upon all the acts of parliament, that have been down to this day, he ſhall find that the power of juſtices of peace to convene and commit felons before indictment is allowed. 4 *E.* 3. *cap.* 2. Sheriffs ſhall not let to mainpriſe ſuch as be indicted or taken by juſtices of peace, unleſs mainpernable by law, 1 *R.* 3. *cap.* 3. and 3 *H.* 7. *cap.* 3. concerning bailing of priſoners committed upon ſuſpicion, 1 & 2 *P.* & *M. cap.* 13. 2 & 3 *P.* & *M. cap.* 10. by which it appears, that juſtices of peace may commit for felony, yea or for ſuſpicion of felony, 3 *Jac. cap.* 10. 5 *H.* 4. *cap.* 10. ſo that the impriſonment before indictment is ſurely lawful and not within the reſtraint of *Magna Charta*; and if ſo, then ſurely their arreſt is much more lawful, for it is but to bring perſons to an examination in order to their commitment, bail, or diſcharge; and there is no greater record of their commitment than of their arreſts.

2. He may alſo iſſue a warrant to apprehend a perſon ſuſpected of felony, tho the original ſuſpicion be not in himſelf, but in the party that prays his warrant; and the reaſon is, becauſe [110] he is a competent judge of the probabilities offered to him of ſuch ſuſpicion.

And as a conſtable may upon complaint arreſt a perſon ſuſpected of felony, as appears by what hath been ſaid in the foregoing chapters (*), ſo a juſtice of peace may do the like by his warrant; and it is alſo the conſtant practice accordingly.

But that I may ſay it once for all, it is fit in all caſes of warrants for arreſting for felony, much more for ſuſpicion of felony, to examine upon oath the party requiring a warrant, as well whether a

(*) *Vide cap.* 10. *p.* 80. and *cap.* 11. *p.* 91. See alſo *Part* 1. *p.* 610.

felony

felony were done, as alſo the cauſes of his ſuſpicion, for he is in this caſe a competent judge of thoſe circumſtances that may induce the granting of a warrant to arreſt.

And if there were no other reaſon to prove it than this, it were ſufficient; namely, that the juſtice of peace may commit him to gaol that is brought before him for ſuch ſuſpicion, or bail him, as appears by the ſtatutes of 1 *R.* 3. *cap.* 3. 3 *H.* 7. *cap.* 3. 1 & 2 *P.* & *M.* *cap.* 10. and therefore *à fortiori* may make a warrant to convene or bring him before him to examine the cauſe of the ſuſpicion.

II. As touching the ſecond matter, to whom this warrant is to be directed?

Uſually the warrant or precept is directed to the ſheriff, or bailiff, conſtable, or tithingman, and they are bound to execute it; and if they do not, they may be indicted and fined for their neglect.

But it may be directed to any private perſon or his own ſervant, 14 *H.* 8. 16. *a.* *Cromſt. de Pace*, *f.* 147. *b* but he is not bound to execute it; but if he execute it, it is as good as if he were an officer.

If a warrant be directed from a juſtice of peace to a conſtable of *D.* to arreſt a felon, &c. he is not bound to go out of the vill, where he is conſtable, to execute the warrant; but yet if he do execute it in another vill, it is good enough, for he acts herein not ſimply as conſtable of *D.* but by virtue of the juſtice's warrant; and ſo it [111] was ruled in my time at the aſſizes in *Norfolk* about 1668.

III. As to the third matter, how and in what manner it is to be made or iſſued? Touching which theſe things are regularly to be obſerved.

The party that demands it ought to be examined upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.

The party charging another thus with felony ought to be bound by recognizance to proſecute at the next ſeſſions or aſſizes, as the caſe ſhall require. *Dalt. cap.* 117. *p.* 334. *(a).*

The warrant ought to be under the hand and ſeal of the juſtice, 2 *Co. Inſtit. p.* 52. It muſt have a certain date, but the place, tho it muſt be alledged in pleading, need not be expreſſed in the warrant. 14 *H.* 8. 16. *a.*

Regularly the warrant ought to contain the cauſe ſpecially, and ſhould not be generally *to anſwer ſuch matters as ſhall be objected*

(a) New Edit. cap. 169. *p.* 579.

againſt

againſt him, becauſe it cannot appear, whether it be within the juriſdiction of the juſtice of peace, neither can it appear whether the party be bailable or not. 2 *Co. Inſtit. p.* 52. 591.

And therefore upon ſuch a general warrant returned upon an *habeas corpus*, it is in the pleaſure of the court of king's bench to bail or diſcharge him; and accordingly for this reaſon, *P.* 23 *Car. B. R.* in *Brown*'s caſe, he was diſcharged.

But yet I hold ſuch a warrant is not therefore void, but if *de facto* the matter be within the juriſdiction of the juſtice, and ſo averred, ſuch a general warrant is a good juſtification eſpecially in caſe of felony, and antiently it was generally held ſuch general warrants were good in caſes of treaſon or felony (*), tho in warrants of the peace and good behaviour the cauſe muſt be ſhewn, that the party may come provided with his ſureties; and accordingly *vide Raſtal's Entries*, tit. *Attachment* 1. *Dalt. cap.* 117. *p.* 329. *(b)*, *Crompt. de Pace*, *f.* 148. *a. T.* 37 *Eliz. C. B. Broughton* and *Mulſhoe (c)*; and accordingly ruled by my lord *Coke* himſelf contrary to his [112] opinion in his comment upon *Magna Charta*, *T.* 7 *Jac. C. B.* the caſe of the mayor of *Canterbury*: *vide ſupra*, *Part* I. *cap.* 54. *p.* 609. *Breach* of priſon.

A juſtice of peace may make his warrant to apprehend a perſon ſuſpected by name upon a complaint made to him; but where upon a complaint to a juſtice of a robbery he made a warrant to apprehend all perſons ſuſpected, and bring them before him, this was ruled a void warrant, *P.* 24 *Car.* 1. in the caſe of juſtice *Swallowe*, and was not a ſufficient juſtification in falſe impriſonment.

A juſtice of peace may make a warrant as well in caſe of felony as of the peace to bring the party *before himſelf*, and then the officer ought to bring the party before him, that made the warrant, 5 *Co. Rep.* 59. *b. Foſter*'s caſe; or he may make the warrant to bring him *before any of his majeſty's juſtices of the peace*, or *before himſelf*, *or any of his majeſty's juſtices of the peace*, and then it is in the election of the officer to bring him before which juſtice of the county he pleaſes; and it is not in the election of the party to go before whom he pleaſes; adjudged 5 *Co. Rep.* 59. *b. Foſter*'s caſe againſt the opinion of *Fineux* 21 *H.* 7. 21. *a.*

(*) *Crompt.* 233. *b.* 1 *Sid.* 78. *Dalt. p.* 574. and Sir *William Wyndham*'s caſe, *Trin.* 2 *Geo.* I. *B. R. Vide tamen* the caſe of *Kendal* and *Rowe*, *State Tr. Vol.* IV. *p.* 861, 862. 5 *Mod. Rep. p.* 80. 82. 85.

(*b*) *New Edit. p.* 574.

(*c*) *Moore*, *p.* 408.

And in ſome caſes he may make his warrant to bring him to the ſeſſions of the peace, tho it is better to bring him before himſelf or ſome juſtice, that the party may be in the mean time bailed, if there be cauſe, to appear at the ſeſſions of the peace or gaol-delivery, as the cauſe ſhall require.

A warrant of the peace may be to bring the party complained of to the juſtice, to the intent to find ſureties for his appearance at the ſeſſions, *&c.* and in the mean time to keep the peace, or the warrant may be *ſi recuſaverit*, then to bring him to the common gaol *ibidem moraturus, quouſque gratis hoc fecerit*; and yet the conſtable or officer may bring him in that caſe before the juſtice; and if he refuſe there to give ſureties, he may by virtue of the firſt warrant bring him to gaol, and commit without any farther warrant or *mittimus*, 5 *Co. Rep.* 59. *b. Foſter*'s caſe.

[113] The warrant of a juſtice before indictment may be in the king's name with the *Teſte* of the juſtice, or it may be in the name of the juſtice of peace himſelf; the latter moſt uſual; but proceſs after indictment iſſued from a ſeſſions of the peace is always in the king's name, *Dalt. Juſtice, p.* 404. 347, 348. *(d)*. But whether generally a juſtice of peace out of ſeſſions can iſſue a warrant to apprehend perſons offending againſt a penal law, tho within their cognizance, and ſo to bind them over to the ſeſſions, or in default thereof to commit them, and this before indictment, ſeems doubtful: *vide Lamb.* 188, 189. *Dalt. cap.* 117. *p.* 331. *(e)*. Theſe things ſeem to make againſt it. 1. Becauſe ſome acts of parliament do particularly and expreſly authorize them to it, which they would not have done, if it had been otherwiſe lawful. 2. Becauſe in moſt caſes of this nature, tho the party were indicted, or an information preferred, yet the *capias* was not the firſt proceſs but a *venire facias* and *diſtringas*, and in caſes of information no proceſs of outlawry at all, 8 *H.* 6. 9. *b.* until the ſtatute of 21 *Jac. cap* 4. gave proceſs of outlawry in actions popular, as in actions of treſpaſs *vi & armis*.

In caſe of a complaint and oath of goods ſtolen, and that he ſuſpects the goods are in ſuch a houſe, and ſhews the cauſe of his ſuſpicion, the juſtice of peace may grant a warrant to ſearch in thoſe ſuſpected places mentioned in his warrant, and to attach the goods and the party in whoſe cuſtody they are found, and bring them before him or ſome juſtice of peace to give an account how he came by them, and farther

(d) *New Edit. p.* 593. (e) *New Edit. p.* 576.

to

to abide ſuch order, as to law ſhall appertain: *vide Dalt. p. 353. (f)*

And this is warrantable by law, and without it felons could not in many caſes be diſcovered, and is the conſtant practice at this day, notwithſtanding the opinion of my lord *Coke* in his juriſdiction of courts, *fol.* 176.

But in that caſe it is convenient, 1. To expreſs that the ſearches be made in the day-time. 2. That the party ſuſpecting be preſent to give the officer information of his goods. 3. There can be no breaking open of doors to make the ſearch, but he muſt enter [114] *per oſtia aperta*, or upon the voluntary opening of the door by the houſe-keeper or his ſervants; and the reaſon is, becauſe the bare having of ſtolen goods in his houſe doth not neceſſarily make a man either a felon or acceſſary. 4. But becauſe the having of ſtolen goods in his cuſtody is *primâ facie* an evidence of a felony and a good cauſe of ſuſpicion, it is a lawful clauſe in the warrant to attach the party, in whoſe cuſtody they are found, to come before the juſtice. 5. The goods being found ought not to be delivered to the party complaining, but to remain in the conſtable's hand, till either by a writ of reſtitution upon the conviction of the felony, or by due order of the court they be delivered.

But the general warrant to ſearch all places, whereof the party and officer have ſuſpicion, tho it be uſual, yet it is not ſo ſafe upon the reaſon of juſtice *Swallow*'s caſe before cited; and yet ſee precedents of ſuch general warrants, *Dalt p.* 353, 354.

The warrant of a juſtice of peace ought regularly to mention the name of the party to be attached, and muſt not be left in generals or with blanks to be filled up by the party afterwards. *Dalt. cap.* 117. *p.* 329. *(g)*. If there be a riot or breach of the peace in the preſence of one or more juſtices, they may arreſt the rioters themſelves, or command any officers or others by word of mouth without warrant to arreſt them, and they may by virtue thereof *flagrante crimine* arreſt them in the abſence of the juſtice by the true meaning of the ſtatute of 34 *E.* 3. *cap.* 1. and 13 *H.* 4. *cap.* 7. *quod vide* adjudged 14 *H.* 7. 9 & 10.

And therefore if a riot be committed and diſperſed by the coming of the juſtice of peace, and they be ſuſpected probably to meet again or threaten to do ſo, tho the conſtables may *ex officio* ſuppreſs the riot,

(f) *New Edit. p.* 598. (g) *New Edit. p.* 574.

and raiſe the power of the vill to do it; yet I think it clear, that a juſtice of peace may deliver a ſpecial warrant in the hands of any perſon to arreſt the rioters, if they re-aſſemble, tho there be no particular
[115] perſons named in the warrant, becauſe it may be impoſſible to be known what their names are, and yet the peace is neceſſary to be kept, as well as the breach of it to be puniſhed; and the juſtice cannot always perſonally watch their re-aſſembling, but muſt truſt others to do it; and this is admitted of all hands in the book of 14 *H.* 7. 9. and the only doubt is, whether it may be done by word, which yet is adjudged there good.

And thus far for warrants.

IV. The fourth thing is the manner and order of their execution.

If a warrant or precept to arreſt a felon come to an officer or other, if the felon be arreſted and after arreſt eſcape into another county, yet he may be purſued and taken upon freſh purſuit, and brought before the juſtice of the county where the warrant iſſued, for the law adjudgeth him always in the officer's cuſtody by virtue of the firſt arreſt; but if he eſcapes before arreſt into another county, if it be a warrant barely for a miſdemeanor, it ſeems the officer cannot purſue him into another county, becauſe out of the juriſdiction of the juſtice that granted the warrant; but in caſe of felony, affray, or dangerous wounding, the officer may purſue him, and raiſe *hue* and *cry* upon him into any county, but if he takes him in a foreign county, he is to bring him to the gaol or juſtice of that county, where he is taken, for he doth not take him purely by the warrant of the juſtice, but by the authority that the law gives him; and the juſtice's warrant is a ſufficient cauſe of ſuſpicion and purſuit. 2 *E.* 4. 6. *b. Dalt. cap.* 118. *p.* 340. *(h)*, 7 *E.* 3. 16. *b.* 11 *E.* 4. 4. *b.*

Tho a perſon, that hath a warrant to arreſt for felony or other miſdemeanor, may call others to his aſſiſtance, yet he cannot make a warrant to another as his deputy to execute it, or command another to execute it in his abſence. 8 *E.* 4. 14. *a.*

But it is held, that if the warrant be directed to the ſheriff, he may make a warrant to his bailiff to execute it, and may command by word his under-ſheriff to execute it without any other warrant. 8 *E.* 4. 14. *a. Dalt. cap.* 117. *p.* 332. *(i)*.

(h) New Edit. p. 24. & 585. *(i) New Edit. p.* 577.

If

If a warrant iſſue from a *juſtice* of peace to a private perſon to arreſt for felony or any other matter, he is not bound to ſhew his warrant, unleſs it be demanded, and then he muſt ſhew it.

But if it be directed to a known officer, as to the ſheriff, who is a known officer in the county, or to a conſtable, who is a known officer in the vill, he is not bound to ſhew his warrant, tho demanded, no more than a bailiff *jurus & conus*; it is enough for him to ſay *I arreſt you for felony, &c. in the king's name.* 8 *E.* 4. 14. *a.* 14 *H.* 7. 9. *b.* 21 *H.* 7. 23. *a.* 9 *Co. Rep.* 69. *Mackally's* caſe (*).

But it is reaſonable and alſo ſafe for the officer to acquaint him what he attacheth or arreſteth him for, for it is a great ſecurity to the officer that arreſts him, and juſt for the party arreſted to know the cauſe for what it is.

A warrant of a juſtice of peace to arreſt for felony may be executed in a franchiſe within the county, for it is the king's ſuit, in which a *non omittas* is virtually included.

Where by virtue of a warrant from a juſtice of peace the houſe may be broken to apprehend a felon or other malefactor, there are theſe diverſities.

Upon a warrant to ſearch for ſtolen goods the doors cannot be broken open; for tho it be for the king, yet the law enables not the breaking of houſes in all caſes for the king: (*vide* ſtatute 12 *Car.* 2. *cap.* 19. a ſpecial act to enable the ſearch and breaking open of an houſe in caſe of goods uncuſtomed) and therefore the entry to ſearch by ſuch a warrant muſt be *per oſtia aperta.*

So upon an *excommunicato capiendo*, tho it be the king's ſuit, yet doors cannot be broken to take him. *H.* 42 *Eliz. C. B. Croke, n.* 17. *Smith* and *Smith (k).*

If a juſtice of peace iſſues a warrant to apprehend a felon, who is in his own houſe, and after notice of the warrant and requeſt to open the door it is refuſed or neglected to be done, the officer may break open the door to take him; and the ſame law is, if it be but for ſuſpicion of felony. 13 *E.* 4. 9. *b.* 5 *Co. Rep.* 91. *b. Semain's* caſe (†). [117]

(*) This was an an arreſt in a civil action, and the warrant there meant was not the writ or warrant for arreſting the party, but the general warrant conſtituting him bailiff, and of this are the caſes in the year-books here cited to be underſtood; tho it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. *Vide Part* I. *p.* 458 *in notis.*

(*k*) *Cro. Eliz.* 741.

(†) *Part* I. *p.* 582.

And ſo much more may he break open the houſe of another perſon to take him, for ſo the ſheriff may do upon a civil proceſs. 5 *Co. Rep.* 93. *a. Semain*'s caſe. But then he muſt at his peril ſee that the felon be there, for if the felon be not there, he is a treſpaſſer to the ſtranger whoſe houſe it is; but in both caſes the officer muſt firſt notify his buſineſs that he comes about, and demand admiſſion. *Ibidem.*

But in caſe of warrants to ſearch for ſtolen goods I think the doors of any perſon cannot be broken up.

If a warrant of the peace iſſue from a juſtice of peace, the officer or miniſter of ſuch warrant may break open a door in caſe of refuſal to open after demand and notice of his buſineſs: ruled by Bayley and *Clerk* 3 *Jac. Dalt. cap.* 78. *p.* 204, 205. *(l).*

Now touching the killing of a man *juſticiari ſe nolentis*, where there is a lawful warrant againſt him, much hath been ſaid before; where I conſidered the conſtable's power (*); ſomewhat I ſhall ſay here.

It is neceſſary in this caſe to conſider the difference between an arreſt upon a warrant for felony, and an arreſt for a ſimple miſdemeanor.

And alſo a difference if the officer kills him in caſe of a flight, or of a reſiſtance and an attempt of a reſcue after arreſt.

If there be a warrant againſt *A.* for a treſpaſs or breach of the peace, and *A.* flies and will not yield to the arreſt, or being taken makes his eſcape, the miniſter kills him, this is murder.

But if *A.* either upon the attempt to arreſt, or after the arreſt aſſault the miniſter, that hath the warrant to arreſt him, to the intent to make his eſcape from him, and the miniſter ſtanding upon his guard kills him, this is no felony, for being by law authorized to arreſt him, he is not bound to go back to the wall, as in common caſes of *ſe defendendo*, for the law is his protection. And therefore as on the one ſide if *A.* kills him, it is murder, ſo on the other ſide if upon this aſſault by *A.* the miniſter kills him, it is no felony; the neceſſity excuſeth him, if he cannot otherwiſe ſave himſelf and perform his duty.

[118]

And herein it agrees with the common caſe of a ſheriff's bailiff in the execution of his warrant. *Co. P. C. cap.* 8. *p.* 56.

(l) New Edit. cap. 127. *p.* 427. (*) *Supra, p.* 91 & 77. *Part* I. *p.* 489.

But

But where a warrant iſſueth againſt a felon, and either before arreſt or after he flies and defends himſelf with ſtones, as the book of 3 *E.* 3. *Coron.* 290. or with his bow and arrows, as the record is of *M.* 22 *E.* 3. *Rot.* 117. *coram rege Ebor (m)*, ſo that the officer muſt give over his purſuit, or otherwiſe cannot take him without killing him, if he kills him, it is no felony; and the ſame law is for a conſtable, that doth it *virtute officii*, or upon a purſuit of *hue* and *cry*.

And the ſame law it is, if in truth he were no felon, but yet a warrant is againſt him as ſuſpect of felony, and he having notice thereof flies and reſiſts, for the officer or miniſter ought to purſue his warrant, or otherwiſe he is puniſhable; and the party by his flight and reſiſtance is acceſſary to his own death.

But then there muſt be theſe cautions. 1. He muſt be a lawful officer, or there muſt be a *hue* and *cry*, or there muſt be a lawful warrant. 2. That the party ought to have notice of the reaſon of the purſuit, namely becauſe a warrant is againſt him, for his flight muſt be upon notice to him of the intent to arreſt him for felony. 2 *E.* 4. 9. *a.* And 3. It muſt be a caſe of neceſſity, and that not [119] ſuch a neceſſity as in the former caſe, where an immediate aſſault is made upon the miniſter juſt at his coming to arreſt, or to reſcue himſelf from him; but this is the neceſſity, *viz.* that he cannot otherwiſe be taken, and the reaſon is, becauſe it is for the public good, and they are puniſhable, if they neglect in any manner what they ought to do, namely the miniſter by fine and impriſonment, and the townſhip by an amercement.

But tho a private perſon may arreſt a felon, and if he flies ſo as he cannot be taken without he be kild, it is excuſable in this caſe for the neceſſity, 22 *Aſſiz.* 55. *per Thorp*, yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at leaſt before the arreſt, ſeems at leaſt manſlaughter for the reaſon above

(*m*) This was the caſe of *Henry Veſcy*, who had been indicted before the ſheriff of *Yorkſhire anno R. R. nono* of divers felonies, whereupon the ſheriff *mandavit commiſſionem ſuam* Henrico *de* Clyderawe *& aliis ad capiendum prædictum* H. Veſcy *& ſalvò ducendum uſque caſtrum de* Ebor'. *Veſcy* would not ſubmit to an arreſt, but fled, *& inter fugiendum* ſhot with his bow and arrows at his purſuers, but in the end was kild by *Clyderawe*. *Clyderawe* was afterwards indicted, "quòd felonicè interfecit prædictum *H. Veſcy*, ſed quia compertum eſt, quòd prædictus *H. de Clyderawe* prædictum *H. Veſcy* indictatum de diverſis feloniis fugam faciendo, ut felonem domini regis, virtute commiſſionis ſuæ prædictæ anno R. nono interfecit & non felonicè; conſideratum eſt, quod idem *H. de Clyderawe* eat inde quietus."

given, for an innocent perſon is not bound to take notice of a private perſon's ſuſpicion (*).

If a juſtice of peace have juriſdiction in the caſe, (as he hath in all felonies and breaches of the peace, yea tho it be high-treaſon, ſo far forth as it is a breach of the peace) tho he errs in granting of his warrant, it ſeems that the officer that executes it, is excuſable. 14 *H.* 8. 16. *a. per curiam.*

Yet in ſome caſes, as touching rates for the poor, tho he hath juriſdiction in the matter by the ſtatute of 43 *Eliz. cap.* 2. the officer is puniſhable for executing the warrant, where none ought to iſſue, becauſe it is a circumſcribed particular juriſdiction given him by act of parliament, which he ought ſtrictly to purſue. *T.* 10 *Car. B. R.* 2 *Rol. Abr.* 560. *Nichols* and *Walker.*

When the officer or miniſter hath made his arreſt, he is forthwith to bring the party to the gaol, or to the juſtice, according to the import of the warrant.

But if the time be unſeaſonable as in or near the night, whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick and not able at preſent to be brought, he may, as the caſe ſhall require, ſecure him in the ſtocks, or in caſe the [120] quality of the perſon or the indiſpoſition ſo require, ſecure him in a houſe till the next day, or ſuch time as it may be reaſonable to bring him. 2 *E.* 4. 9 & 10. (†).

When he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, till either the juſtice diſcharge or bail him, or till he be actually committed to the gaol by warrant of the juſtice. 10 *H.* 4. 7. *a. Eſcape* 8.

And thus far concerning arreſts by warrant or precept.

See Burn. tit. Arreſt. Index to 2 Hawk. P. C. tit. Arreſt. 4 Blackſ. Comr ch. 21. Of Arreſts. pa. 289. &c. See 2 Wilſon 288. Entick v. Carrington touching General Warrants.

(*) *Vide ſupra, p.* 83. (†) *Vide ſupra, p.* 95, 96.

CHAP.